87-684

No.

IN THE

Supreme Court Of The United States

October Term, 1987

LARRY GILL,

Petitioner

vs.

THE STATE OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

OF COUNSEL:

KIMBERLY R. WEST
Suite 200, The Massey Building
2025 Third Avenue North
Birmingham, Alabama 35203

J. WILSON DINSMORE
LARRY WAITES
DINSMORE, WAITES, STOVALL & LUKER
Suite 100, The Age Herald Building
2107 Fifth Avenue North
Birmingham, Alabama 35203
(205) 252-9751

Attorneys for Petitioner Gill

October, 1987

QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS EGREGIOUSLY DENIED DUE PROCESS OF LAW THROUGHOUT THE COURSE OF THE STATE OF ALABAMA'S CRIMINAL PROCEEDING AGAINST HIM. SPECIFICALLY, WHETHER THE LACK OF REQUISITE PRETRIAL PROCEEDINGS, THE TRIAL COURT'S FAILURE TO RECUSE ITSELF ON GROUNDS OF BIAS AND PREJUDICE, THE STATE PROSECUTOR'S WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE AND IMPROPER CLOSING REMARKS TO THE JURY, AND THE DENIAL OF PETITIONER'S NEW TRIAL MOTION, BASED IN PART ON EVIDENCE OF HIS INNOCENCE OF THE CHARGE, SEPARATELY AND SEVERALLY RENDERED THE PROCEEDING A TRAVESTY OF JUSTICE AND A MOCKERY OF FUNDAMENTAL FAIRNESS.

II. WHETHER PETITIONER WAS SUBJECTED TO MULTIPLE AND DISPROPORTIONATE PUNISHMENTS FOR THE SAME OFFENSE.

TABLE OF CONTENTS

TABLE OF CONTENTS – (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – (Continued)

No.

IN THE

Supreme Court Of The United States

October Term, 1987

LARRY GILL,

Petitioner

vs.

THE STATE OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

Petitioner[1] respectfully prays that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court of August 28, 1987, denying without opinion review of the issues raised concerning his conviction and sentence in this case, previously affirmed without opinion by the Alabama Court of Criminal Appeals by Judgment of July 15, 1986.

OPINIONS BELOW

Petitioner timely appealed his judgment of conviction and sentence to the Alabama Court of Criminal Appeals. By Judgment of July 15, 1986, the Alabama Court of Criminal Appeals affirmed his conviction and sentence without opinion.

[1]Petitioner's undersigned counsel respectfully submits that to the best of his knowledge the style of this case accurately reflects all parties having an interest in its outcome.

Petitioner timely filed an Application for Rehearing in the Alabama Court of Criminal Appeals. This Application for Rehearing was denied without opinion by the Alabama Court of Criminal Appeals on August 12, 1986.

Petitioner timely filed a Petition for Writ of Certiorari to review the Judgment of the Alabama Court of Criminal Appeals in the Alabama Supreme Court. The Alabama Supreme Court initially granted the Petition for Writ of Certiorari on January 28, 1987. By order of March 20, 1987, the Alabama Supreme Court denied oral argument on the Writ, and submitted the case on the briefs. By order of August 28, 1987, the Alabama Supreme Court quashed the Writ as improvidently granted without opinion.

These orders appear in full in the Appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (3). This Petition was timely filed within sixty days of the date of the Alabama Supreme Court's Judgment and Order of August 28, 1987.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

The Sixth Amendment to the United States Constitution provides in full:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Eighth Amendment to the United States Constitution provides in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

STATEMENT OF THE CASE

Petitioner was arrested on February 4, 1983, for having thrown an object into his wife's car, and made bond. (R-566-567).[2] On February 8, 1983, Petitioner was re-arrested on a warrant for the attempted murder of Mrs. Gill. (R-565). Under Alabama law, Petitioner filed a timely demand for a preliminary hearing. (R-577; Appendix hereto). This demand was never granted. After his indictment by the grand jury, Petitioner filed a motion for a preliminary hearing. (R-585; Appendix hereto). This motion was denied by the Walker County Circuit Court. (R-613; Appendix hereto). In addition, the record reflects that Petitioner was never formally arraigned in this case. In motions before the trial court, Petitioner claimed that his denial of a preliminary hearing violated due process. (R-583; Appendix hereto). In briefs before the Alabama Court of Criminal Appeals and the Alabama Supreme Court, Petitioner raised the issue that the failure to formally arraign him deprived him of due process. (Appendix hereto).

[2]The record in this case consists of a four volume trial transcript, exhibits and pleadings numbered sequentially. In addition, a one volume transcript of the recusal hearing proceedings is also included and paginated separately. This Petition refers to the trial record as "R-," and the recusal hearing record as "RH-". Where materials referenced also appear in the Appendix to this Petition, that fact is noted.

The prosecuting witness against Petitioner was his wife, Marirose Beaird Gill. Her father is a retired Circuit Judge of Walker County, Alabama, and her brother a prominent local attorney. By order of March 8, 1983, the presiding judge of the Walker County Circuit Court recused all judges in Walker County from presiding over Petitioner's case. (R-576; Appendix hereto). The Alabama Supreme Court assigned Judge Junkin from Fayette, Alabama, to preside. Judge Junkin began presiding over this case.

After a conversation with his friends, Judge Beaird and Jim Beaird, Walker County Circuit Judge Wilson volunteered to try Petitioner's case. (RH-14-15). Judge Wilson so informed the presiding judge, and the case was re-assigned to Judge Wilson. (R-613, 611; Appendix hereto). Petitioner moved to set aside this order, and to recuse Judge Wilson on the ground of bias and prejudice in favor of the prosecuting witness and her family. (R-615; Appendix hereto).

A recusal hearing was held on Petitioner's motion. Judge Wilson refused to recuse himself from presiding over this hearing, and offered unsworn testimony as to whether he should be recused or not. He stated that he would believe Judge Beaird if he were called as a witness in this case and his testimony contradicted that of the Petitioner, and that an attempt by the defense to try the prosecuting witness would not be tolerated by him and he would "come to her rescue." (RH-12, 17-18).

Petitioner filed a Petition for Writ of Mandamus to require Judge Wilson to recuse himself on the ground of bias and prejudice in the Alabama Court of Criminal Appeals. (Appendix hereto). It was denied by that Court without opinion. (R-625; Appendix hereto). The Alabama Supreme Court, also without opinion, denied review of this decision by petition for writ of certiorari. (R-626; Appendix hereto).

At trial, Judge Wilson refused to exclude subpoenaed witnesses Judge Beaird and Jim Beaird from the courtroom under the Rule concerning the separation of witnesses. (R-16-17). During the prosecuting witness' direct testimony, Judge Wilson retired the jury to inquire as to her well being. (R-157-158).

Judge Wilson admonished counsel during cross-examination not to "push" her. (R-216). In motion for new trial before the trial court, and in briefs before the Alabama Court of Criminal Appeals and the Alabama Supreme Court, Petitioner raised the issue of whether Judge Wilson erred in refusing to recuse himself on the ground of bias or prejudice. (R-633-640; Appendix hereto).

At trial, the State prosecutor's investigator, Mr. Vaughn, testified on cross-examination that he conducted a test firing of a shotgun into a car similar to Mrs. Gill's. (R-475). He stated that he made a report of the results and placed it in the State Prosecutor's file. Although the shotgun pellets removed from Mrs. Gill's car were completely round and not scored in any way, the "test pellets" removed from a similar car were oblong and scored as if they had hit something. (R-476-477). Although two pretrial motions to produce were filed by the defense requesting this information and were granted by the trial court, it was never provided until discovered on cross-examination at trial. (R-588, 594; Appendix hereto). In motion for new trial before the trial court, and in briefs to the Alabama Court of Criminal Appeals and the Alabama Supreme Court, Petitioner contended that the state prosecutor's withholding of this material exculpatory evidence violated his due process rights. (R-633; Appendix hereto).

In closing argument at trial, the state prosecutor argued that the defense had the right to appeal a guilty verdict to a higher court. (R-504-505). Petitioner moved for a mistrial, which was denied. Petitioner raised the issue of the prosecutor's improper closing before the trial court on motion for new trial and in briefs before the Alabama Court of Criminal Appeals and the Alabama Supreme Court. (*Id.*)

The evidence against Petitioner at trial consisted of Mrs. Gill's statement that she saw him before the incident and the contradictory testimony of her friend and employee, seventeen year old Cindy Franks, concerning a man she saw in the area before the incident. (R-155-156, 113-117). Petitioner testified that he was twenty-five miles away on the night of the shooting

at the Greentop Cafe in Jefferson County, Alabama. (R-408). Seven witnesses testified that they saw Petitioner at the Greentop Cafe on the night of the shooting and during the time period when it supposedly took place. (R-253, 306, 325, 327, 356, 373, 400). In his motion for new trial, Petitioner contended that the verdict was against the great weight of the evidence; proffered the results of a polygraph examination establishing he did not shoot at his wife; and requested a further investigation by the State of his claim of innocence. (R-633; Appendix hereto). Both before the trial court on motion for new trial and in briefs before the Alabama Court of Criminal Appeals and the Alabama Supreme Court, Petitioner claimed that his due process rights were violated by the denial of his conviction and the denial of his motion for new trial.

Petitioner was convicted of the lesser included offense of assault in the second degree. The Alabama statute dividing the crime of assault into degrees adds the additional element of use of a firearm or deadly weapon to differentiate between assault in the second degree and third degree. Assault in the second degree is subject to an enhanced punishment of not more than ten years or less than one year and one day as a Class C felony, whereas assault in the third degree carries a misdemeanor penalty of not more than a year's imprisonment.

Petitioner, however, was subjected a *further* enhanced penalty of a mandatory ten years imprisonment under a separate statute applying to all felonies committed with a firearm or deadly weapon.

Petitioner raised the issue of the constitutionality of his sentence in briefs before the Alabama Court of Criminal Appeals and the Alabama Supreme Court. (Appendix hereto).

REASONS FOR GRANTING THE WRIT

I. Petitioner Was Egregiously Denied Due Process Of Law Throughout The Course Of The State Of Alabama's Criminal Proceeding Against Him. Specifically, The Lack Of Requisite Pretrial Proceedings, The Trial Court's Refusal To Recuse Itself On Grounds Of Bias And Prejudice, The State Prosecutor's Withholding Of Material Exculpatory Evidence And Improper Closing Remarks To The Jury, And The Denial Of Petitioner's New Trial Motion, Based In Part On Evidence Of His Innocence Of The Charge, Separately And Severally Rendered The Proceeding A Travesty Of Justice And Mockery Of Fundamental Fairness.

Petitioner would submit that the record is clear that he was egregiously and repeatedly deprived of fundamental constitutionally protected rights throughout the course of the criminal proceeding against him in the Circuit Court of Walker County, Alabama. No jealous protection by the State of Alabama of the rights guaranteed him by the United States Constitution to insure fundamental fairness in criminal proceedings is apparent on the face of this record. To the contrary, the record is for the most part tellingly silent in the face of Petitioner's repeated assertions of significant constitutional rights.

Specifically, Petitioner submits four points in the State of Alabama's proceeding against him at which substantial deprivations of his constitutionally assured rights occurred: 1) pretrial, in the failure of the State of Alabama to afford him a preliminary hearing on the charges against him, and in the failure of the State of Alabama to notify him of the nature and cause of the charges against him by formal arraignment; 2) at trial, by the trial court's refusal to recuse itself due to bias and prejudice in favor of the prosecuting witness and her family; 3) at trial, by the discovery that the State prosecutor had withheld from Petitioner material exculpatory evidence and by the State prosecutor's improper closing remarks to the

jury; and 4) post-trial, by the denial of Petitioner's motion for new trial based in part on evidence of his innocence of the charges against him. Petitioner submits that each of these four instances represents a significant deprivation of his constitutional rights, and each merits this Court's granting of the Writ. Petitioner also submits that each instance, as a strand in the whole, combines to form a proceeding that is constitutionally unacceptable and supports the granting of this Writ.

Finally, Petitioner would note that he has steadfastly maintained his innocence throughout the trial and appellate proceedings in this case. The evidence against him at trial was less than overwhelming; thus enhancing and magnifying the prejudicial effect of the noted constitutional deprivations, and unacceptably heightening the risk of the conviction of an innocent man. And yet, to date, no appellate court has spoken on the substantial constitutional issues raised by Petitioner. To prevent a miscarriage of justice, and to fulfill the Constitution's mandate as a protector of each citizen's constitutionally grounded rights, this Court should grant the Writ in this case.

A. *Petitioner Was Denied Due Process of Law By the State of Alabama's Denial of Critical PreTrial Proceedings in This Case.*

1. *Facts.*

Petitioner's then wife, Marirose Beaird Gill, alleged that on the evening of February 3, 1983, he did something to the car in which she was sitting across from the Walker County Courthouse. Much later that evening, and after she had attended a meeting in the courthouse, Mrs. Gill returned to the courthouse with her brother, an attorney, and father, a retired Circuit Judge of Walker County, Alabama. (R-209; RH-10-11). Well after normal working hours, a District Court Judge for Walker County, Alabama, signed a warrant for Petitioner's arrest charging that he threw or shot a stone, brick, or piece or iron, metal or deadly or dangerous missile into Mrs. Gill's car, in violation of *Ala. Code* § 32-5-11 (1975). No law en-

forcement officials were contacted by Mrs. Gill or her family at this time. (R-52). Petitioner was arrested pursuant to this warrant on February 4, 1983, and made bond. (R-566-567).

On February 8, 1983, Mrs. Gill appeared before a Circuit Judge for Walker County, Alabama, and swore out a warrant for Petitioner's arrest on the charge of attempted murder, in violation of *Ala. Code* § 13A-6-2 (1975). (R-568-569). Petitioner was re-arrested on this warrant the same day. (R-565).

Pursuant to the requirements of *Ala. Code* § 15-11-1 (1975), Petitioner filed a timely demand for a preliminary hearing. (R-577; Appendix hereto). Petitioner was then indicted by the grand jury for Walker County, Alabama, on two counts: attempted murder, and throwing or shooting a rock, stone, brick or piece of iron, steel or other like metal, or a deadly or dangerous missile into Mrs. Gill's car. (R-574-575). Petitioner then filed a motion for a preliminary hearing, stating that the indictment was sought by the State of Alabama as a means to deny him the right to a preliminary hearing which would probably result in the dismissal of the charges against him. (R-585; Appendix hereto). Petitioner filed at the same time a motion for continuance of the trial date scheduled in the case, stating that he was denied a preliminary hearing in violation of due process of law, and thus did not have sufficient information with which to investigate the charges against him and to prepare a defense. (R-583; Appendix hereto). Petitioner's motion for a preliminary hearing was denied by Circuit Judge James E. Wilson on July 7, 1983. (R-613; Appendix hereto).

Although the Circuit Court of Walker County's minutes for the trial date of February 14, 1984, state that Petitioner had "heretofore plead not guilty," a review of the record reveals that at no point in the proceedings was Petitioner ever read in open court the charges against him and entered a plea. (R-628). Apparently, it was the intent of the State of Alabama to arraign him the day of trial; a practice objected to by Petitioner as violative of due process of law. (R-597-598; Appendix

hereto). There is, however, no record of evidence that this flawed procedure was in fact followed in this case.

In short, the pretrial proceedings in this case are constitutionally notable by their absence. The effect of this lack was to put Petitioner to trial for his liberty armed only with the bare language of the statutes alleged against him. This lack effectively deprived Petitioner of the meaningful ability in an adversary criminal trial "to make a defense as we know it;" embracing the complex of Sixth Amendment rights applicable to the criminal courts of the State of Alabama through the Due Process Clause of the Fourteenth Amendment. *Faretta v. California,* 422 U.S. 806, 818 (1975).

2. *Deprivations of Due Process by Denials of a Preliminary Hearing and Arraignment.*

In *Coleman v. Alabama,* 399 U.S. 1 (1970), and *Hamilton v. Alabama,* 368 U.S. 52 (1961), this Court recognized that preliminary hearing and arraignment are "critical stages" in a criminal proceeding in an Alabama court. This Court held that as such, the State is constitutionally required to provide counsel for indigent defendants facing these proceedings. The constitutional right to counsel at arraignment and preliminary hearing has been reaffirmed by this Court in *Kirby v. Illinois,* 406 U.S. 682 (1972).

Neither the *Coleman* nor the *Hamilton* Court addressed the issue here presented: whether the State of Alabama's denial to Petitioner of a preliminary hearing and arraignment violates due process. Both cases are, however, instructive as to the nature and magnitude of the proceedings here denied.

In *Coleman,* this Court noted that "the preliminary hearing is not a required step in an Alabama prosecution," and that "under Alabama law the sole purposes of a preliminary hearing are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury and, if so, to fix bail if the offense is bailable." 399 U.S. at 8-9. This Court held, however, that once a preliminary hear-

ing is provided, it is a critical stage requiring the provision of counsel:

> Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail. *Id.* at 9.

The *Hamilton* Court found a similar critical stage in the arraignment process under Alabama law, in which special pleas must be entered or barred. In fact, the Court found that if an indigent defendant is not provided an attorney at arraignment in the Alabama criminal process, prejudice from this lack would be presumed. 368 U.S. at 56.

With these recognized critical confrontations between an accused and the State of Alabama at preliminary hearing and arraignment foremost in mind, Petitioner respectfully submits that this Court should grant the Writ to address the underlying issue flowing from *Coleman* and *Hamilton*: when, and in what circumstances, does due process require that the State of Alabama provide a defendant with a preliminary hearing and arraignment?

As to the provision of a preliminary hearing, the Alabama Supreme Court has held that "an accused in Alabama has a statutory right to demand a preliminary hearing after arrest and if that demand is made within thirty days of arrest it must be granted." *Ex Parte Potts,* 426 So. 2d 896, 898 (1983). That

right is not held to be "absolute" under Alabama law, however, and may be denied once an accused is indicted. *Duncan v. State*, 369 So. 2d 885 (Ala. Crim. App. 1979). According to the Alabama Court of Criminal Appeals, due process does not require that an accused be furnished with a preliminary hearing after indictment, because both are probable cause determinations. *Duncan, supra.*

Petitioner respectfully disagrees with the Alabama court's analysis of this federal constitutional issue. Once a State creates the right to a preliminary hearing, it may not arbitrarily deny that right on the capricious decision of the State to seek indictment after the demand, but before the hearing. The potential for arbitrary abuse under such a scheme is apparent: to avoid the discovery mechanism of the preliminary hearing, all the State need do is, as here, seek an indictment after arrest and demand for the preliminary hearing and before the preliminary hearing is even set. Established standards of equal protection, as well as due process, are offended by treating accuseds, all who have filed a demand under Alabama law for a preliminary hearing and are otherwise similarly situated, differently based on the State's solely controlled timing as to whether to seek indictment before or after the date set, if set at all, for their preliminary hearing. Equally offensive to traditional notions of fair play and principled judicial proceedings, is the potential for abuse inherent in such a system.

Nor are the proceedings leading up to the probable cause determinations, and the determinations themselves, in any way similar between the preliminary hearing and the grand jury's indictment. Notably, the accused is excluded from the grand jury proceedings, which are kept secret from him. *Coleman's* above description of the critical stage of the preliminary hearing is, obviously, in stark contrast. Probable cause to bind over to the grand jury is likewise dissimilar and based on a distinct standard from the probable cause to return an indictment followed by the grand jury.

Further compounding this error of constitutional magnitude, Petitioner was never arraigned on the charges against him.

The Sixth Amendment, incorporated through the Due Process Clause of the Fourteenth Amendment, requires that an accused "be informed of the nature and cause of the accusations" against him. Procedurally, this basic tenet of our adversary system of criminal justice is served by formal arraignment, whereby an accused is read the charges against him in open court and enters a plea. *Hamilton* describes the critical nature of this constitutionally required procedure under Alabama law. And yet, Petitioner was never arraigned in this case. Standing alone, and in conjunction with the State's denial of a preliminary hearing, the failure to arraign Petitioner, giving him notice of the nature and cause of the accusations against him, violated due process.[3]

In essence, the State's denial of a preliminary hearing or arraignment to Petitioner in this case put him to trial by ambush. No other procedural mechanisms were available to Petitioner before trial under Alabama law to discover the basis of the State's charges and to prepare his defense for trial. This Court has long recognized that due process requires that criminal defendants be "afforded a meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984). This is precisely the opportunity that was denied Petitioner by the State of Alabama. It is worth repeating that Petitioner was forced to prepare his defense for trial on little other than the bare wording of the indictment. For these reasons, Petitioner would respectfully submit that the Writ is due to be granted, and his conviction reversed.

---

[3]Petitioner would also note that the issues raised herein implicate the Sixth Amendment's right to the assistance of counsel, incorporated in the Due Process Clause of the Fourteenth Amendment. This Court has recognized that criminal defendants are constitutionally entitled to the "effective" assistance of counsel. *See Strickland v. Washington,* 466 U.S. 668 (1984). In this case, Petitioner was denied the *effective* assistance of counsel by the State of Alabama denying his counsel the tools, through information gathered at the preliminary hearing and arraignment, to effectively prepare and present his defense.

B. *Petitioner was Denied Due Process of Law By The State of Alabama's Refusal to Provide Him With a Fair and Impartial Tribunal.*

It is an elementary component of due process that an accused be deprived of his liberty by the State only after proceedings before a fair and impartial tribunal. In this case, however, Petitioner was tried by a trial judge who had previously been recused from hearing his case; who spoke with the prosecuting witness' family and then volunteered to try the case; who stated before trial his decisions as to certain credibility choices between the prosecuting witness' family members and the defense and stated his intent to limit the defense's case and examination of the prosecuting witness; who permitted subpoenaed family member witnesses to remain in the courtroom during testimony at trial; and who admonished defense counsel not to push the prosecuting witness and discharged the jury to inquire after her welfare. Elusive and difficult though bias and prejudice may be to demonstrate on a cold record, Petitioner submits that the record here admits of but one interpretation: the trial court's bias and prejudice in favor of the prosecuting witness and her family deprived him of due process of law. This Court should grant the Writ to address the issue of when and in what circumstances such bias and prejudice rises to a due process violation and should, Petitioner respectfully submits, reverse his conviction on this basis.

1. *Facts.*

Petitioner's then wife, the prosecuting witness, Marirose Beaird Gill, is the daughter of retired Walker County Circuit Judge Beaird and the sister of a prominent Walker County attorney, Jim Beaird.

Petitioner was indicted in this case in the February, 1983, term of the Walker County grand jury. By *sua sponte* Order of March 8, 1983, the Presiding Judge for the Walker County Circuit Court, Judge Nation, recused all circuit judges in Walker County, Alabama's judicial circuit from presiding over

any further matters regarding the proceeding against Petitioner. (R-576). The Chief Justice of the Alabama Supreme Court entered an Order dated March 16, 1983, re-assigning the case to Circuit Judge Clatus Junkin, Fayette, Alabama. (R-579). Judge Junkin then presided over some preliminary matters in this case. By letter of May 18, 1983, Judge Nation informed Petitioner's counsel that Circuit Judge James E. Wilson of Walker County would preside over this case in place of Judge Junkin. (R-602). Petitioner moved to set aside this letter's order re-assigning the case to Judge Wilson. (R-608). Judge Wilson began presiding over the case, and denied this motion. (R-613; Appendix hereto). By Order of May 26, 1983, the Alabama Supreme Court relieved Judge Junkin of any further duties in the case. (R-611). By formal order of July 11, 1983, Judge Nation assigned the case to Judge Wilson. On July 13, 1983, Petitioner filed a Motion to Recuse Judge Wilson on the ground of personal bias and/or prejudice towards the prosecuting witness in this case. (R-615).

A hearing was held on Petitioner's motion for recusal before Judge Wilson on September 19, 1983. Initially, Petitioner moved that Judge Wilson recuse himself from ruling on the motion to recuse. (RH-5). Judge Wilson refused, and presided, as well as testifying unsworn, over the recusal hearing. (RH-6, 9-19). Judge Wilson testified that he sat on the bench with Judge Beaird, knew his daughter, Marirose Beaird Gill, and his son, Jim Beaird. (RH-10-11). Judge Wilson considered both Judge Beaird and Jim Beaird to be his friends. (*Id.*) If Judge Beaird were to be a witness in this case, Judge Wilson would give his testimony a "great deal of weight," based on his belief that Judge Beaird is an honest man and would tell the truth. (RH-11). If Judge Beaird's testimony were to contradict that of Petitioner, Judge Wilson would believe Judge Beaird. (RH-12).

As to the circumstances surrounding his re-assignment, Judge Wilson stated that at the time of Judge Nation's order recusing all Walker County judges, he "didn't say anything to Judge Nation about it," but "had a conversation with Judge Beaird

or with Jim . . . or maybe both of them with reference to whether or not and why all of the Judges had recused themserves." (RH-14). Judge Wilson stated that he said to the Beairds, "Well, I'm sorry, I haven't recused myself. I will be glad to try the case." (*Id.*) Judge Wilson then volunteered to Judge Nation to try the case. (RH-15). Judge Wilson also stated that an attempt to try the prosecuting witness instead of the defendant by the defense would "stir me up pretty good." (RH-17), and he would "come to her rescue." (R-18).

Judge Nation was called as a witness by Petitioner, but Judge Wilson refused to permit any examination by Petitioner as to Judge Nation's reasons for issuing the original order recusing all the Circuit Judges of Walker County in this case. (RH-24). By Order of September 19, 1983, Judge Wilson denied the Motion to Recuse himself. (R-622).

The next day, Petitioner filed a Petition for Writ of Mandamus in the Alabama Court of Criminal Appeals, alleging error in Judge Wilson's refusal to recuse himself. (Appendix hereto.) It was denied the same day. Petitioner's Application for Rehearing in the Alabama Court of Criminal Appeals was filed and granted on September 21, 1983. (R-623; Appendix hereto). The Petition was then denied without opinion by the Alabama Court of Criminal Appeals on October 6, 1983, and the Alabama Supreme Court denied the Petition for Certiorari to the Alabama Court of Criminal Appeals without opinion on January 3, 1984. (R-625-626; Appendix hereto).

Judge Wilson presided over Petitioner's trial. The defense had subpoenaed as witnesses Judge Beaird and Jim Beaird. Prior to the start of trial, Judge Wilson refused to exclude these two witnesses from the courtroom after counsel invoked the Rule concerning the separation of witnesses during trial proceedings. (R-16-17). Later, Judge Wilson changed his mind and placed Jim Beaird under the Rule, but refused to require Judge Beaird to leave the courtroom. (R-66). During the prosecuting witness' direct testimony, Judge Wilson *sua sponte* halted the proceedings to inquire as to her well being. (R-157-158). During cross-examination, Judge Wilson admonished de-

fense counsel not to "push" the witness. (R. 216). Judge Wilson presided over the post-trial proceedings in this case, denying Petitioner's Motion for New Trial based, in part, on error in the court's refusal to recuse itself. (R-633-634, 640; Appendix hereto). This issue was raised by Petitioner before the Alabama Court of Criminal Appeals and the Alabama Supreme Court in the direct appeal of this case, and denied by both Courts without opinion. (Appendix hereto).

2. *Deprivation of Due Process by the Trial Court's Refusal to Recuse Itself on the Grounds of Bias and Prejudice Towards the Prosecuting Witness and Her Family.*

It is clearly established that the Due Process Clause guarantees an accused an impartial tribunal. As stated by Justice Black in *In re Murchison,* 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent *even the probability of unfairness.* (emphasis supplied).

This constitutionally mandated requirement applies to both civil and criminal cases, and has been described by this Court as a "neutrality requirement in adjudicative proceedings." *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 243 (1980).

> The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or law. See *Mathews v. Eldridge,* 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to popular government, that justice has been done," *Joint Anti-Fascist Committee v. McGrath,* 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. *Id.*

Based on this principle, this Court has struck down a procedure where a justice of the peace was paid for the issuance of war-

rants, *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam), and where the mayor presided over a court which accounted for a substantial portion of the village's revenues, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); reversed a defendant's conviction for contempt when he was tried by the same judge who had previously held him in contempt, *Taylor v. Hayes*, 418 U.S. 488 (1974), and reversed the convictions of defendants rendered by the mayor of a town when his salary was partly paid from the fees and costs arising from his judicial activity, *Tumey v. Ohio*, 273 U.S. 510 (1927). In short:

> The requirement of neutrality has been jealously guarded by this Court . . . Indeed, "justice must satisfy the appearance of justice," *Offut v. United States*, 348 U.S. 11, 14 (1954), and this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," *In re Murchison*, 349 U.S. 133, 136 (1955). *Marshall v. Jerrico, Inc.*, 446 U.S. at 238.

Most recently, this Court has applied this stringent rule to hold that recusal of a judge is constitutionally required when he has a direct, personal, substantial pecuniary interest in a case. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. ____, 106 S. Ct. ____, 89 L.Ed 2d 823 (1986). This Court made clear that once such an interest is found:

> [W]e are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "would offer a possible temptation . . . to the average [judge] . . . [to] lead him not to hold the balance nice, clear and true." 89 L.Ed 2d at 835, *quoting Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

The majority opinion in *Lavoie*, authored by Chief Justice Burger, expressly did not decide the issue of whether allegations of bias and prejudice of the type in the case before it[4] could be

[4]Appellant insurance company in *Lavoie* alleged that Justice Embry's general hostility towards insurance companies that were slow in paying claims required a conclusion that the Due Process Clause was violated by his participation in the case.

sufficient to force recusal under the Due Process Clause. Justice Brennan's concurrence stressed:

> I do not understand that . . . the Court states that only an interest that satisfies this test [of a direct, personal, substantial and pecuniary interest] will taint the judge's participation as a due process violation. Nonpecuniary interests . . . have been found to require recusal as a matter of due process . . . Nothing in the Court's opinion should be read, as I understand it, to limit these precedents in any way. Rather, the Court clearly indicates the contrary in acknowledging that the interests which trigger due process condemnation "cannot be defined with precision." *Id.* at 838 (citation omitted).

Confirming Justice Brennan's interpretation, this Court had held in *Webb v. Texas,* 409 U.S. 95 (1974) (per curiam), that a criminal defendant had been denied due process of law based on the judge's conduct indicating a bias against him. In *Webb,* the trial judge's hostility toward the defendant was manifested by threatening remarks which effectively drove the defendant's sole witness from the stand. *Id.* at 353. This Court found that the defendant had been deprived of due process of law based on this nonpecuniary interest.

Conversely from *Webb,* Petitioner submits that the trial judge's bias and prejudice against him were manifested in his bias and prejudice *in favor of* the prosecuting witness and her family. In this case, the credibility of the prosecuting witness, Marirose Beaird Gill, was absolutely essential to the prosecution's case. The record reflects that the trial of this case boils down to essentially a swearing match between Mrs. Gill and Petitioner as to who shot into her car. And yet, after originally being recused in this case, the trial judge discussed the matter with his friends, the Beairds, and then volunteered to take the case from Judge Junkin; presided and testified at the recusal hearing, serving notice of his intention to believe the Beairds and to limit attack upon and aid the prosecuting witness; and at trial did in fact so limit the attack and aid the prosecuting witness, while permitting her witness family members to remain present in the courtroom. This record supports an inference not

only of constitutionally impermissible apparent bias and prejudice, but of the neutrality principle so far abandoned as to have the trial court almost assuming a special prosecutor's role toward the prosecuting witness and family.

For these reasons, and to clarify the decision in *Lavoie,* Petitioner respectfully submits this Court should grant the Writ.

C. *Petitioner was Denied Due Process of Law By the State Prosecutor's Withholding of Material Exculpatory Evidence and Improper Closing Remarks to the Jury.*

It is a core due process right that criminal defendants have constitutionally guaranteed access to material exculpatory evidence in order to prepare and present their defense. It is equally implicit in prevailing notions of fundamental fairness that the decisionmaker be free from the influence of improper argument in arriving at its decision. Petitioner was denied these rights in the trial of this case.

1. *Facts.*

Prior to trial, Petitioner filed two Motions to Produce. (R-588, 594; Appendix hereto). The first motion requested, among other things, any shotgun shells collected by an investigator in relation to this offense and any evidence tending to exculpate or inculpate Petitioner. (R-588; Appendix hereto). The second motion requested any and all physical evidence and any and all reports dealing with physical evidence taken from Mrs. Gill's car. (R-594; Appendix hereto). The trial court granted Petitioner's Motions to Produce as to these requests. (R-613; Appendix hereto).

At trial, the State called as a witness the investigator for the Walker County District Attorney's office, Mr. John Vaughn. On cross-examination, he testified that on July 21, 1983, after the motions to produce had been granted and four or five days before a then scheduled trial date of this case, he conducted a test firing into a car similar to Mrs. Gill's. (R-475). He prepared a report of the results of this test and placed it in the

prosecutor's file. At this point, the prosecutor objected to defense counsel being given the report. The trial court overruled. (*Id.*) Mr. Vaughn then testified that he had removed two number nine shot shotgun pellets from Mrs. Gill's car. Both were completely round and not scored in any way. (R-473-474). The "test pellets," however, which he removed from a similar car were oblong and scored as if they had hit something. (R-476-477). After having been placed in the prosecutor's file, the "test pellets" were destroyed. (R-476).

In closing summation, the prosecutor made the following argument to the jury:

> I can't appeal to anybody. The defense can appeal to a higher Court. I can't appeal. This is it. I have one shot at it. It's like having one shot in your gun and you are out hunting with your dogs and he points at that last bird and you haven't got one all day long and you shoot and you miss it. Well, that's it. I've got one shot and that's this: If you were to return a verdict of "not guilty," this case is ended for eternity. The defense can appeal this case. (R-504-505).

Defense counsel objected, and the trial court instructed the jury: "[Y]ou are not to consider the fact that the defense can appeal the case, and you are not to consider that in making up your verdict under any circumstances." Defense counsel then moved for a mistrial and was overruled. (*Id.*)

2. *Deprivations of Due Process by the State Prosecutor's Withholding Material Exculpatory Evidence and Improper Closing Remarks to the Jury.*

In a long line of cases this Court has defined and refined a criminal defendant's constitutionally guaranteed access to evidence. Underpinning these decisions and the constitutional privileges therein, is the rationale that the delivery of exculpatory evidence into the hands of the accused "protect[s] the innocent from erroneous conviction and ensure[s] the integrity of our criminal justice system." *California v. Trombetta,* 467 U.S. 379 (1984). This is precisely what did not happen in

Petitioner's case, with the very existence of the report proving that the pellets found in Mrs. Gill's car had not struck anything not known until cross-examination of the investigator, and the critical test pellets themselves destroyed.

Brady v. Maryland, 373 U.S. 83 (1963) held that a criminal defendant has a constitutionally protected privilege to request and receive from the prosecution evidence material to his guilt. *United States v. Agurs,* 427 U.S. 97 (1976) held that even absent a request, a prosecutor is constitutionally required to turn over exculpatory evidence raising a reasonable doubt about the defendant's guilt.

In this case, a specific and general *Brady* request was made by the defense and granted by the trial court. There is no doubt that the test report and results are material evidence bearing on Petitioner's innocence of the charge of shooting shotgun pellets into Mrs. Gill's car. There is no doubt that the report and results were in the prosecutor's possession. There is no doubt that Petitioner's counsel did not learn of this critical exculpatory evidence until cross-examination at trial. There is no doubt that the constitutional privilege guaranteeing access to evidence in a criminal trial overrides any asserted "work-product" privilege of the State. There is no doubt that Petitioner was denied a meaningful opportunity to present a complete defense based on the prosecutor's withholding of this material and exculpatory evidence.

The prosecutor's closing remarks concerning the defense's right to appeal a guilty verdict to a higher court improperly attempted to lead the jury into a mistaken belief that theirs' was not the ultimate responsibility for deciding this case. This Court has addressed and condemned this precise argument in the context of capital sentencing procedure. *Caldwell v. Mississippi,* 415 U.S. 20 (1985). Petitioner would submit that in the context of this case this argument infringed on his due process rights, and that this deprivation was not in any way cured by the trial court's less than vigorous instructions. *Cf. Donnelly v. DeChristoforo,* 416 U.S. 637 (1974); *Wilson v.*

United States, 149 U.S. 60 (1893). For these reasons, Petitioner respectfully submits that the Writ should be granted.

D. *Petitioner was Denied Due Process of Law By the Denial of His Motion for New Trial, Based in Part on Evidence of His Innocence.*

After trial, Petitioner proffered to the trial court the results of a polygraph examination establishing his innocence of the charge and requested further investigation as to his innocence. The trial court's denial of Petitioner's new trial motion, supported by this evidence, deprived him of fundamental fairness in this proceeding.

1. *Facts.*

The evidence against Petitioner at trial was less than overwhelming. Mrs. Gill testified that she saw Petitioner immediately prior to a loud explosion and her windshield shattering. (R-155-156). Mrs. Gill's friend and seventeen year old employee, Cindy Franks, testified that she saw a car in the area prior to the shooting and saw a man with his back turned running away from the direction of Mrs. Gill's car after she heard a loud noise. (R-91-92, 127). She gave conflicting descriptions of the man she saw in the car. (R-113-117). Before trial, she testified in deposition that the man she saw in the car in the area prior to the shooting did not have a beard and a mustache. (R-113-114). After her deposition testimony, she had spoken with the state prosecutor, and at trial she thought he did have a beard and mustache. (R-116-117). At the time of trial and on the night of February 3, 1983, Petitioner had a full mustache and beard. (R-415, 681).

Petitioner testified that he did not fire a shotgun into his wife's car and that in fact he was not in Jasper, Walker County, Alabama, on that date, but was twenty-five miles away at the Greentop Cafe in Jefferson County. (R-408). Seven witnesses present at the Greentop Cafe the night of February 3, 1983, testified that Petitioner arrived at the Greentop Cafe around 5:30 that afternoon and did not leave until about 11:30 that

evening. (R-253-254; 306; 325; 327; 356; 373; 400). The incident with Mrs. Gill occurred a few minutes before 6:00 p.m., around 5:50 - 5:55 p.m. (R-127, 155).

The jury returned a verdict against Petitioner of guilty of the lesser included offense of assault in the second degree. (R-628). Petitioner timely filed a motion for new trial, stating as grounds that the verdict was against the great weight of the evidence and that Petitioner had newly discovered evidence to present. (R-633-634; Appendix hereto). In a motion for continuance of the new trial hearing, Petitioner stated that the results of a polygraph examination show that he is innocent of the charge; that this evidence combined with the testimony at trial leads to a substantial doubt as to whether he is guilty; and requested that the State of Alabama re-open the investigation of this case and specifically submit Petitioner to a polygraph examination administered by the State. (R-636; Appendix hereto). Attached to this motion were the results of a polygraph examination by a licensed examiner, concluding that Petitioner answered truthfully in stating that he had never shot at his wife or his wife's car; did not know his wife was going to be shot at; was not present when his wife was shot at and did not shoot at his wife. (R-638-639; Appendix hereto).

The trial court denied Petitioner's motion for new trial and for continuance. (R-640; Appendix hereto.) The Alabama Court of Criminal Appeals and Alabama Supreme Court denied Petitioner's due process claim based on this denial without opinion. (Appendix hereto).

2. *Deprivation of Due Process by The Trial Court's Denial of Petitioner's Motion for New Trial Based on Evidence of His Innocence.*

It has been long held by this Court that the reasonable doubt standard for conviction in criminal cases is of constitutional statuture. *In re Winship,* 397 U.S. 358 (1970). It is equally well established that a criminal conviction devoid of evidentiary support violates due process. *Jackson v. Virginia,* 443 U.S.

307 (1979); *Vachon v. New Hampshire,* 414 U.S. 478 (1974); *Gregory v. Chicago,* 394 U.S. 111 (1969). Petitioner would submit that this case comes within this rule, and that the Writ should be granted and his conviction reversed due to the lack of evidentiary support and thus denial of due process in his conviction.

Petitioner would also submit that the facts of this case support a logical extension of this constitutional principle to the situation where a criminal defendant, after conviction against the great weight of the evidence, proffers substantial proof of his innocence and requests further investigation by the State. Both the State's interest in obtaining justice and the integrity of the judicial system are served by addressing and further investigating a claim of innocence in a disputable case. And, of course, the defendant's constitutionally protected due process right not to be convicted on evidence beyond a reasonable doubt is thereby upheld and vindicated. For these reasons, Petitioner would respectfully submit the Writ is due to be granted.

II. Petitioner Was Subjected To Multiple And Disproportionate Punishments For The Same Offense.

Petitioner was convicted of the lesser included offense of second degree assault. *Ala. Code* § 13A-6-2 (1975). In charging the jury, the trial judge specifically referred to the elements included in *Ala. Code* § 13A-6-21 (2), second degree assault: causing physical injury by means of a deadly weapon or dangerous instrument. The statute defining the crime of second degree assault, *Ala. Code* § 13A-6-21 (2), also provides that it shall be punishable as a Class C felony. Under Alabama law, a Class C felony is punishable by imprisonment for not more than ten years or less than one year and one day. *Ala. Code* § 13A-5-6 (3) (1977). § *Ala. Code* 13A-5-6 (5) (1981) provides a mandatory sentence of not less than ten years imprisonment for a Class C felony in which a firearm or deadly weapon is used to commit the felony. Petitioner was sentenced under the

mandatory statute to ten years imprisonment for second degree assault.

In analyzing this Court's precedent concerning the constitutional effect of such sentencing, Petitioner would submit two important points concerning Alabama's statutory scheme. First, the use of a deadly weapon or firearm is *both* an essential element of the substantive crime, assault in the second degree as opposed to assault in the third degree, *and* a sentencing factor critical to the application of the enhancement statute, § 13A-5-6-(5). Second, the substantive crime of assault in the second degree *itself* provides for enhanced punishment as a Class C felony based on the use of a firearm or deadly weapon in committing the assault. Assault in the third degree is defined as intending to or causing injury to another without the use of a firearm or deadly weapon. *Ala. Code* § 13A-6-22-22(a)(1). Assault in the third degree is a Class A misdemeanor, with a penalty of less than one year imprisonment. Thus, based on the element of a deadly weapon or firearm, Petitioner was subjected an enhanced penalty under the second degree assault statute as well as *further enhancement* under § 13A-5-6(5).

In *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), this Court held that the Double Jeopardy Clause "protects against multiple punishments for the same offense." In *Whalen v. United States*, 445 U.S. 684, 692 (1980), this Court applied that principle in light of the test in *Blockburger v. United States*, 284 U.S. 299 (1932), holding that "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." That is precisely the case here, where both the assault in the second degree statute, itself enhancing the punishment of the assault offense due to use of a firearm or deadly weapon, and 13A-5-6(5) firearm or deadly weapon enhancement authorize cumulative punishment for the same offense. And, because no record is kept of Alabama legislative history and the face of 13A-5-6(5) does not speak to its intent to further enhance offenses already enhanced by the firearm or deadly weapon factor, there is no clear indi-

cation of legislative intent to impose cumulative punishments. It is more reasonable to assume that the legislature intended to enhance the punishment only for crimes such as murder, kidnapping, or sodomy, that do not include an essential element of the use of a firearm or deadly weapon, and not those crimes that already by higher degree reflect firearm enhancement than to assume that the legislature intended to further enhance the already enhanced punishment for crimes such as assault in the second degree.

For these reasons, this case is readily distinguishable from *Missouri v. Hunter*, 459 U.S. 360 (1983) and *Albernaz v. United States*, 450 U.S. 333 (1981). In *Albernaz*, the federal substantive statutes, conspiracy to import marijuana and conspiracy to distribute it, did not proscribe the same offense under *Blockburger, supra*, and this Court found cumulative punishment proper. That is simply not the case here, with one substantive offense, assault in the second degree, building in enhanced punishment due to the use of a firearm or deadly weapon and a second punishment statute, § 13A-5-6(5), again enhancing punishment based on the same factor. Likewise, in *Hunter*, this Court upheld cumulative punishment under two statutes proscribing the same offense because "the Missouri Legislature has made its intent crystal clear" to impose cumulative punishments. 459 U.S. at 369. Again, that is simply not the case here, where there is no record of the legislative history of the statutes and there is no clear indication from the face of the statute that the Alabama legislature did not intend to only enhance crimes whose elements did not include the use of a deadly weapon or firearm and not *further enhance* crimes already enhanced by the legislative degree distinction based on use of a deadly weapon or firearm.

For these reasons, and based on the rule of lenity this Court has followed in construing criminal statutes, Petitioner would submit that the Writ is due to be granted and his sentence reversed based on his being subjected to multiple punishments in violation of the Double Jeopardy Clause.

Petitioner would also rely on *Solem v. Helm*, 463 U.S. 277 (1986) for his claim that the ten year enhanced sentence for his conviction of assault in the second degree violates the proportionality requirement of the Eighth Amendment. Petitioner would note that he had never been convicted of a felony before, that the evidence at trial was disputed, and that he had proffered proof of his innocence at trial and post-trial. Although within the range authorized by the legislature, the ten year term of imprisonment was grossly disproportionate to this offense and this offender.

CONCLUSION

For these reasons, both separately and severally, and to prevent a miscarriage of justice, Petitioner prays that a Writ of Certiorari issue to review the Judgment of Alabama Supreme Court.

Respectfully submitted,

J. Wilson Dinsmore
Dinsmore, Waites, Stovall & Luker
Suite 100, The Age Herald Building
2107 Fifth Avenue North
Birmingham, Alabama 35203
(205) 252-9751

OF COUNSEL:

Kimberly R. West
Suite 200, The Massey Building
2025 Third Avenue North
Birmingham, Alabama 35203

APPENDIX

TABLE OF CONTENTS

TABLE OF CONTENTS – (Continued)

TABLE OF CONTENTS – (Continued)

TABLE OF CONTENTS – (Continued)

I. DECISIONS BELOW

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
6th Div. 530
Walker Circuit Court, CC 83-33

LARRY JOE GILL, Appellant
vs.
STATE OF ALABAMA, Appellee

Dear Sir:

You are hereby notified that on July 15, 1986 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

____ Notice of Appeal filed. Future correspondence should refer to the above number.
____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____. As to briefs, see Rules 28, 31 and 32, A.R.A.P.
____ On motion, record on appeal accepted and considered as timely filed in this Court.
____ Appellant granted seven (7) additional days to file brief. Brief due on _____.
____ Appellee granted seven (7) additional days to file brief. Brief due on _____.
____ Appellant granted seven (7) additional days to file reply brief. Brief due on _____.
____ Brief of Appellant filed.
____ Oral argument requested by appeallant.
____ Oral argument request disallowed; appeal submitted on briefs.
____ Appeal submitted to the Court for decision in the following manner:
XXX Appeal affirmed. No opinion. Judgment not final, see Rule 41, A.R.A.P.
____ Appeal dismissed. No opinion.
____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.
____ Application for rehearing filed.
____ Application for rehearing overruled. No opinion. Judgment not final, see Rule 41, A.R.A.P.
____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.

____ Appeal placed on rehearing ex mero motu.
____ Certificate of Final Judgment issued to Circuit Clerk.

/s/ MOLLIE JORDAN
Clerk
Court of Criminal Appeals
of Alabama

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
6th Div. 530
Walker Circuit Court, CC 83-33

LARRY JOE GILL, Appellant
vs.
STATE OF ALABAMA, Appellee

Dear Sir:

You are hereby notified that on August 12, 1986 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

____ Notice of Appeal filed. Future correspondence should refer to the above number.
____ Record on Appeal filed. Date of Certificate of Completion of Record on Appeal: _____. As to briefs, see Rules 28, 31 and 32, A.R.A.P.
____ On motion, record on appeal accepted and considered as timely filed in this Court.
____ Appellant granted seven (7) additional days to file brief. Brief due on _____.
____ Appellee granted seven (7) additional days to file brief. Brief due on _____.
____ Appellant granted seven (7) additional days to file reply brief. Brief due on _____.
____ Brief of Appellant filed.
____ Oral argument requested by appeallant.
____ Oral argument request disallowed; appeal submitted on briefs.
____ Appeal submitted to the Court for decision in the following manner:
____ Appeal affirmed. No opinion. Judgment not final, see Rule 41, A.R.A.P.
____ Appeal dismissed. No opinion.
____ Application for rehearing and Rule 39(k), A.R.A.P., motion filed.

____ Application for rehearing filed.
XXX Application for rehearing overruled. No opinion. Judgment not final, see Rule 41, A.R.A.P.
____ Application for rehearing returned for non-compliance with Rule 40, A.R.A.P.
____ Appeal placed on rehearing ex mero motu.
____ Certificate of Final Judgment issued to Circuit Clerk.
XXX Rule 39(k) motion denied.

/s/ MOLLIE JORDAN
Clerk
Court of Criminal Appeals
of Alabama

OFFICE OF CLERK OF THE SUPREME COURT
STATE OF ALABAMA

Re: 85-1402
EX PARTE: LARRY GILL
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Larry Joe Gill, Appellant, vs. State, Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.
_____ Court Reporter granted additional time to file reporter's transcript to and including
_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
_____ Appell_____ granted 7 additional days to file briefs to and including
_____ Appellant(s) granted 7 additional days to file reply briefs to and including
_____ Record on Appeal filed
_____ Appendix Filed
_____ Submitted on Briefs
_____ Petition for Writ of Certiorari denied. No opinion.
_____ Application for rehearing overruled. No opinion written on rehearing.
_____ Permission to file amicus curiae briefs granted
XXXX Petition for Writ of Certiorari to the Court of Criminal Appeals granted.

PER CURIAM

TORBERT, C.J., JONES, SHORES, ADAMS AND STEAGALL, JJ., CONCUR.

Attorneys should consult Rule 39(f) and (h), ARAP, regarding the filing of additional briefs and oral argument.

PLEASE USE ABOVE CASENUMBER ON ALL MATERIAL FILED IN THIS CASE.

/s/ ROBERT G. ESDALE

1/28/87 — Robert G. Esdale, Clerk
Supreme Court of Alabama

OFFICE OF CLERK OF THE SUPREME COURT
STATE OF ALABAMA

Re: 85-1402

EX PARTE: LARRY GILL

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(RE: LARRY J. GILL, Appellant, vs. STATE, Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

_____ Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

XXXX Note to Attorneys: Pursuant to Rule 34(a), ARAP, the Request for Oral Argument in your case has

been denied. Your case is today being submitted on briefs.
TORBERT, C. J., JONES, SHORES, ADAMS AND STEAGALL, JJ., CONCUR.

/s/ ROBERT G. ESDALE

3/20/87 Robert G. Esdale, Clerk
Supreme Court of Alabama

OFFICE OF CLERK OF THE SUPREME COURT
STATE OF ALABAMA

Re: 85-1402
EX PARTE: LARRY GILL
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Larry Joe Gill, Appellant, vs. State, Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.
_____ Court Reporter granted additional time to file reporter's transcript to and including
_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
_____ Appell_____ granted 7 additional days to file briefs to and including
_____ Appellant (s) granted 7 additional days to file reply briefs to and including
_____ Record on Appeal filed
_____ Appendix Filed
_____ Submitted on Briefs
_____ Petition for Writ of Certiorari denied. No opinion.
_____ Application for rehearing overruled. No opinion written on rehearing.
_____ Permission to file amicus curiae briefs granted
XXXXX Writ Quashed as Improvidently Granted. No Opinion.
STEAGALL, J. – TORBERT, CJ., JONES, SHORES AND ADAMS, JJ., CONCUR.

/s/ ROBERT G. ESDALE

8/28/87 Robert G. Esdale, Clerk
Supreme Court of Alabama

II. FEDERAL QUESTIONS RAISED BELOW

A. ISSUES CONCERNING DENIAL OF A PRELIMINARY HEARING AND FORMAL ARRAIGNMENT

IN THE CIRCUIT COURT FOR WALKER COUNTY, ALABAMA

STATE OF ALABAMA,
Plaintiff,
VS. CASE NO. CC 83 33
LARRY GILL,
Defendant.

MOTION FOR A PRELIMINARY HEARING

Comes now the Defendant, Larry Gill, and moves this Honorable Court to grant him a Preliminary Hearing pursuant to Section 15-11-1, *Code of Alabama,* 1975, and states grounds as follows:

1. The Defendant was arrested on February 4, 1983, and within thirty (30) days thereof demanded a preliminary hearing in the District Court of Walker County.

2. The Defendant was indicted before a preliminary hearing was scheduled or allowed, the said indictment being issued just solely as a mean to deny the Defendant a right to a preliminary hearing.

3. A preliminary hearing would in all likelihood result in the dismissal of the charges against the Defendant.

IN THE CIRCUIT COURT FOR WALKER COUNTY, ALABAMA

STATE OF ALABAMA,
Plaintiff,
VS. CASE NO. CC. 83 33
LARRY GILL,
Defendant.

MOTION TO CONTINUE

Comes now the Defendant, Larry Gill, and moves this Honorable Court to continue the trial of said cause scheduled May 9, 1983, at 9:00 a.m. and as grounds states as follows:

1. Defendant has filed various proper Motions now pending before this Court that must be heard and adjudicated prior to trial.

2. Defendant has filed with this Court a Motion to Produce certain evidence in the hands of the State of Alabama for inspection, copying and testing. Defendant has not been provided such pieces of evidence as required by law, and has not had time and will not have time to properly inspect, copy and test said evidence before May 9, 1983, in order for this Honorable Court to adjudicate various Motions filed herein it will be necessary subpoena various witnesses whose names must be ascertained by investigation. The Defendant can not secure the names and addresses of said witnesses in time to have subpoenae issued.

3. The Defendant was denied a preliminary hearing in said cause in violation of due process, and therefore does not have sufficient information with which to investigate the allegations against him and to prepare a defense.

4. Due to prior commitments of Defendant's Attorney, he does not have sufficient time to prepare for a hearing on the Motions filed herein, nor to prepare a defense prior to May 9, 1983. Defendant has been apprised that he will be arraigned on said charges and tried on the same day, May 9, 1983, said proceeding being unjustly, unfair, prejudicial, and in violation

of due process of the Constitution of the State of Alabama and the United States Constitution.

IN THE CIRCUIT COURT OF WALKER COUNTY
STATE OF ALABAMA, Plaintiff

vs.

LARRY GILL, Defendant
Case Number CC-83-33

This cause coming on to be heard upon the following motions filed on behalf of the defendant and upon a consideration of the same,

IT IS THE ORDER JUDGMENT AND DECREE OF THE COURT AS FOLLOWS:

1. The defendant's Motion for a Preliminary Hearing is hereby denied.

2. The defendant's Motion for a More Definite Statement is hereby denied.

3. The defendant's Motion to Suppress is hereby denied.

4. The defendant's Motion for Severance is hereby denied.

5. The defendant's Motion to Produce is hereby granted to the extent discussed and agreed upon in open Court between the defendant's Attorney and the District Attorney as set out in the record.

6. The defendant's Motion to Examine the automobile involved in this transaction is hereby granted to the extent discussed and agreed upon in open Court between the Defendant's Attorney and the District Attorney as set out in the record.

7. The defendant's Motion in Limine is hereby granted.

8. The defendant's Motion to Dismiss on the grounds of the prior recusal by the presiding Judge is hereby denied with leave to the defendant's attorney to look into the matter from both a legal and factual standpoint and to pursue any other motion which the defendant deems to be in his best interest.

DONE AND ORDERED, This the 7th day of July, 1983.

/s/ JAMES E. WILSON
Circuit Judge

IN THE ALABAMA COURT OF CRIMINAL APPEALS

LARRY GILL, Appellant,

vs.

STATE OF ALABAMA, Appellee.

BRIEF AND ARGUMENT OF APPELLANT, LARRY GILL

ARGUMENT V

WHETHER THE DEFENDANT WAS DENIED DUE PROCESS OF LAW BY THE FAILURE TO PROPERLY ARRAIGN HIM

The Defendant was never read in open court the charges against him nor did he plead in person or stand mute. The failure to properly arraign a Defendant must cause a reversal. *Rorex vs. State,* 203 So. 2d 294, *Town of Gulf Shores vs. Jones,* 412 So. 2d 1259, *Ludland vs. State,* 296 So. 2d 254, *Newsom vs. State,* 270 So. 2d 680.

Apparently due to the manipulation of this case by the Circuit Court of Walker County, Supreme Court of Alabama and the Circuit Judge in Fayette County, the Defendant by mistake or oversight was never arraigned; that is, he never had the indictment read to him nor entered a formal plea. There can be no trial on the merits in a criminal case until the Defendant has pleaded not guilty or his plea has been entered for him by the court. *Chestnut vs. State,* 47 So. 2d 248. The error could have been corrected at any time before or during the trial and before the jury retired and it is not cured simply by the trial being conducted with the full consent and participation of the Defendant. *Newsom, supra.* In the judgment of conviction, the trial court mistakenly included in his Order that the Defendant had heretofore plead not guilty. Either the trial judge used his "standard terminology" in dictating the written Order or he was simply under the mistaken assumption that the Defendant had been formally arraigned by Judge Junkin. In either event, it was a mistake on the part of the trial Judge as

the record after a thorough search clearly shows to the contrary. The case was initially set for arraignment and trial before Judge Junkin, but no appearance before Judge Junkin by the Defendant or his attorney was ever made. As a matter of fact, Judge Junkin continued the case upon motion and in the meantime the Alabama Supreme Court reassigned it to a judge of the Circuit Court in Walker County. The Case Action Summary (R-570-573), the adjudication of guilt by the trial Judge (R-532) and the sentencing hearing by the trial Judge (R-544) are completely devoid of any mention of a formal arraignment as required.

The Defendant did not enter a formal plea of not guilty as proved above. However, and for argument purposes only, *assume* what the trial Judge said in his formal Order was true, the Defendant had heretofore "pled not guilty". Even that is not sufficient under the law. It has been the rule of law since the old Star Chamber days that a Defendant could not be brought into court without being formally apprised of the charges against him. It is not a question of simply saying "not guilty, not guilty, not guilty", but moreso is a question of to *what charges* the Defendant is saying "not guilty". In the instant case there is no question that the Defendant participated in these proceedings and denied his guilt, but this is obviously not sufficient. *Newsom, supra.*

The failure to properly arraign the Defendant is a violation of due process and thus the case is due to be reversed and remanded for a new trial. *Constitution of the United States,* Amendments V and XIV.

IN THE SUPREME COURT OF ALABAMA

EX PARTE: LARRY GILL,
VS.
IN RE: LARRY GILL, APPELLANT - PETITIONER
STATE OF ALABAMA, APPELLEE - RESPONDENT

AN APPEAL FROM THE CIRCUIT COURT OF
WALKER COUNTY, ALABAMA

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
(6th DIV. 530)

BRIEF AND ARGUMENT OF LARRY GILL

ARGUMENT V

WHETHER THE DEFENDANT WAS DENIED DUE PROCESS OF LAW BY THE FAILURE TO PROPERLY ARRAIGN HIM.

The Appellant adopts his argument and cases cited in his original brief.

B. ISSUES CONCERNING DENIAL OF A FAIR AND IMPARTIAL DECISIONMAKER

LARRY GILL.	)	COURT OF CRIMINAL APPEALS
	)	
VS.	)	STATE OF ALABAMA
	)	
JAMES E. WILSON.	)	CASE #_____

PETITION FOR WRIT OF MANDAMUS
AND/OR
PETITION FOR WRIT OF PROHIBITION

Comes now the Petitioner, Larry Gill, by and through his attorney and petitions this Honorable Court to issue a Writ of Mandamus or in the alternative a Writ of Prohibition to the

defendant, the Honorable James E. Wilson, directing that he not preside over the pending criminal trial styled "State of Alabama versus Larry Gill, Walker County Case No. CC83-33," and states in support thereof the following facts and grounds:

1. The Petitioner was indicted by the February, 1983 term of the Walker County Grand Jury charging him with violating Titles 13A-6-2 and 32-5-11, *Code of Alabama*. The alleged victim in both counts is Marirose Beaird Gill, the daughter of the Honorable Leon Beaird, retired Circuit Judge, Walker County. At the time of the alleged incident, she was the wife of the petitioner/defendant.

2. On March 8, 1983, an order was entered in the record of said case, whereby all Judges of Walker County were recused. A copy of said order is attached to this petition as Exhibit "A".

3. Subsequently, on or about March 17, 1983, the said criminal trial was set down for trial for May 9, 1983, in the Walker County Courthouse, the Honorable Clatus K. Junkin of the 24th Judicial Circuit having been assigned to preside by the Alabama Supreme Court.

4. On May 18, 1983, the Honorable Horace H. Nation wrote a letter to the petitioner/defendant's attorney stating that Judicial Ethics would not be violated if a Judge from Walker County presided over the case and that Circuit Judge James E. Wilson had agreed to preside. A copy of said letter is attached as Exhibit "B".

5. Assuming Judge Nation's letter of May 18, 1983, was an order, the petitioner/defendant filed a motion to set aside the order of May 18, 1983 (Exhibit "C"). A hearing on said motion and other matters was had on July 7, 1983, Judge Wilson presiding. No oral testimony was taken and the order entered by Judge Wilson is attached as Exhibit "D".

6. Four days later, July 11, 1983, Judge Nation entered on the record an order appointing Judge Wilson to preside over the case (Exhibit "E").

7. On July 12, 1983, the petitioner/defendant filed a Motion to Recuse, attached as Exhibit "F".

8. The case was set for trial on September 20, 1983 at 9:00 A.M. and a hearing on the Motion to Recuse was set for 2:00 P.M. on September 19, 1983.

9. At said hearing on the Motion to Recuse, the petitioner/defendant's attorney moved orally for Judge Wilson to recuse himself from hearing the Motion to Recuse due to the necessity of Judge Wilson's having to rule on the facts that would determine the propriety or impropriety of his recusal. Said oral motion was denied (Exhibit "G").

10. Upon examination of Judge Wilson by petitioner/defendant's attorney, Judge Wilson stated in substance as follows:

A. He has known retired Judge Beaird since the 1940's.

B. He was a Circuit Judge concurrently with Judge Beaird for approximately four years in Walker County and shared overlapping duties and responsibilities with Judge Beaird.

C. He is a friend of Judge Beaird, a friend of Judge Beaird's brother who is an attorney in Jasper and a friend of Judge Beaird's son, who is also an attorney in Jasper.

D. He has never been in Judge Beaird's home and vice-versa.

E. He has known or knows of Judge Beaird's daughter since her birth.

F. His acquaintance with Judge Beaird's daughter is to the extent that he speaks to her in passing, knows her when he sees her and knows she works in the courthouse.

G. He would give Judge Beaird's testimony "great weight" and would believe Judge Beaird over the testimony of the defendant if in conflict because he has known Judge Beaird for years and does not know the defendant, however, he would look at all the circumstances and they could dictate that the defendant's testimony was correct.

H. He would give the testimony of Jim Beaird (son of Judge Beaird) more weight than the defendant's, but not as great a weight as Judge Beaird's testimony.

I. He harbors no bias or prejudice for the alleged victim of the Beaird family to cause him to recuse himself.

J. He would give the defendant every benefit of doubt and bend over backward to give him a fair trial as he would every defendant.

K. That sometime after Judge Nation's order of March 8, 1983 and before May 18, 1983, he had several conversations with members of the Beaird family wherein he stated that he "would be glad to try the case" and there was no reason for him to recuse himself. He said that his comments were made because the Beaird family or members thereof had approached him to inquire as to why he and the other judges recused themselves.

11. Upon examination of Judge Nation by petitioner/defendant's attorney, Judge Nations stated in substance as follows:

A. That Circuit Judge Brotherton (Walker County) telephoned his secretary around March 8 and told her that all three of the judges should recuse themselves from the trial of the Gill case and had her prepare the order of March 8 for his (Judge Nations) signature. His signature was affixed by rubber stamp. He gave no reason to indicate that Judge Wilson held any bias or prejudice that would or should cause him to recuse himself in the trial of this case.

12. At the conclusion of the hearing on the Motion to Recuse, Judge Wilson denied it. (Exhibit "G").

PREMISES CONSIDERED, Petitioner hereby prays that this Honorable Court will: (1) issue an order or decree staying the trial of the cause styled *State of Alabama versus Larry Gill,* pending a hearing and final order on the Petition filed herein, (2) issue a Writ of Mandamus or Prohibition directed to the Honorable James E. Wilson, Circuit Judge, Walker County, directing that he recuse himself from any proceedings entitled *State of Alabama versus Larry Gill,* now pending as Case Number CC 83-33, Walker County, Alabama.

APPLICATION FOR REHEARING

Comes now The Petitioner and moves this Honorable Court to rehear the Petition for Writ of Mandamus/Prohibition filed and denied this date and states the facts and grounds as follows:

1. The Circuit Court case, State v. Larry Gill, the subject of said Petition has been continued for trial until 9:00 a.m. September 21, 1983.

2. Due to the severe time limitations placed on Petitioner's attorney the redention of Circuit Judge Wilson's testimony of yesterday is merely a summation and incomplete.

3. With sufficient time, a complete transcript of the proceedings of yesterday could order by writ of certiorari and would in fact disclose adequate and important reasons for granting of said petition.

4. Based on the understanding that a stay would be issued defense counsel shifted his emphasis from trial preparation, prepared the petition, traveled from Birmingham to Montgomery and was not aware until approximately 3:00 p.m. of denial of the Petition.

5. Circuit Judge Wilson previously advised defense counsel that he would be out of his office this afternoon to attend a funeral and is therefore unable to be reached for consideration of a continuance.

6. To deny the Petition and accompanying stay at this late date and time without a full hearing would work an irreparable hardship on the parties and deny the Petitioner due process and equal protection under the law.

WHEREFORE, based on the above and foregoing facts as presented by Petitioner's counsel in this Application for Rehearing, Petitioner prays that this court will grant this application and set this case for hearing, granting Petitioner's counsel an opportunity to orally argue and further issuing a stay on the trial set in Walker County Circuit Court.

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

6 Div. 301

Ex parte Larry Gill

In re: State of Alabama v. Larry Gill

PETITION FOR WRIT OF MANDAMUS AND/OR PETITION FOR WRIT OF PROHIBITION

Walker Circuit Court
Number CC-83-33

ON REHEARING

It is ordered that the application for rehearing be and the same is hereby granted, the order of September 20, 1983, denying petition is set aside, and a transcript of recusal hearing be forwarded to this Court.

It is further ordered that the trial of this cause be stayed pending final disposition of this petition.

Bowen, P. J., Harris, H. Taylor, JJ, concur.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 21st day of September, 1983.

/s/ MOLLIE JORDAN

Clerk, Court of Criminal Appeals of Alabama

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

6 Div. 301

Ex parte Larry Gill

In re: State of Alabama v. Larry Gill

PETITION FOR WRIT OF MANDAMUS AND/OR PETITION FOR WRIT OF PROHIBITION

Walker Circuit Court
Number CC-83-33

IT IS ORDERED that the petition for writ of mandamus and/or petition for writ of prohibition be and the same is hereby denied.

Bowen, P. J., Harris, S. Taylor, H. Taylor JJ, concur.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 6th day of October, 1983.

/s/ MOLLIE JORDAN

Clerk, Court of Criminal Appeals of Alabama

OFFICE OF CLERK OF THE SUPREME COURT
STATE OF ALABAMA

Re: 83-171

EX PARTE: LARRY GILL

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(RE: STATE OF ALABAMA, Appellant, vs. LARRY GILL, Appellee. PETITION FOR WRIT OF MANDAMUS AND/OR PETITION FOR WRIT OF PROHIBITION.)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.
_____ Court Reporter granted additional time to file reporter's transcript to and including
_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
_____ Appell_____ granted 7 additional days to file briefs to and including
_____ Appellant (s) granted 7 additional days to file reply briefs to and including
_____ Record on Appeal filed
_____ Appendix Filed
_____ Submitted on Briefs
XXXX Petition for Writ of Certiorari denied. No opinion.
SHORES, J. – TORBERT, CJ., MADDOX, JONES AND BEATTY, JJ., CONCUR.
_____ Application for rehearing overruled. No opinion written on rehearing.
_____ Permission to file amicus curiae briefs granted
_____

12/22/83

/s/ ROBERT G. ESDALE

Robert G. Esdale, Clerk
Supreme Court of Alabama

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT OF
	)	
PLAINTIFF.	)	WALKER COUNTY,
	)	ALABAMA
VS.	)	
	)	CASE NO. CC83-33
LARRY GILL,	)	
	)	
DEFENDANT.	)	

MOTION FOR NEW TRIAL

Comes now the Defendant, Larry Gill, and moves this Honorable Court to grant him a new trial and states grounds as follows:

1. The judgment was against the great weight of the evidence.

2. The Court erred in charging the jury that it could return a verdict of a "lesser included offense", namely: assault in the second degree.

3. The Court erred in denying Defendant's Motion for Mistrial in response to the District Attorney's argument to the jury in substance that the State of Alabama did not have a right to appeal any decision of a jury, yet the Defendant had such a right to appeal.

4. The Court erred in overruling various objections raised by the Defendant, said rulings to be numerated for the record at a later date.

5. The Court erred in overruling the Defendant's Motion for the Court to recuse itself.

6. In violation of an Order of Court and in violation of the Constitutional rights of the Defendant, the State of Alabama withheld from the Defendant and his attorney information known to the State of Alabama prior to trial, namely: the results of a scientific test performed by an investigator for the District Attorney's office, John Vaughn.

7. The Court erred in overruling the Defendant's Motion for Judgment of Acquittal.

8. The Defendant has evidence to present that was not known at the time of trial and not reasonably ascertainable before trial.

IN THE CIRCUIT COURT OF WALKER COUNTY, ALABAMA

STATE OF ALABAMA, Plaintiff

vs.

LARRY GILL, Defendant

CC-83-33

This cause coming on to be heard on the defendant's Motion for New Trial, and after consideration of the same, the Court is of the opinion that the defendant's Motion should be denied;

IT IS, THEREFORE, THE ORDER, JUDGMENT AND DECREE OF THIS COURT That the Defendant's Motion for New Trial be and the same is hereby denied.

DONE AND ORDERED, This the 16th day of April, 1984.

/s/ JAMES E. WILSON

Circuit Judge

IN THE ALABAMA COURT OF CRIMINAL APPEALS

LARRY GILL, Appellant,

vs.

STATE OF ALABAMA, Appellee.

BRIEF AND ARGUMENT OF APPELLANT, LARRY GILL

ARGUMENT II

WHETHER THE CIRCUIT JUDGE SHOULD HAVE RECUSED HIMSELF FROM PRESIDING OVER THE TRIAL.

Even though this issue was raised by Petition for Writ of Mandamus and/or Petition for Writ of Prohibition which was denied by this Court (6 Div. 301) it may also be properly raised on appeal. *Shell vs. Shell,* 267 So. 2d 461. The grounds for disqualification are not limited to those found in the statute. Code of Alabama, Section 12-1-12, *Shell vs. Shell, supra, Rushing vs. City of Georgiana,* 361, So. 2d 11, Canons of Judicial Ethics (3).

In order to do justice to this issues it is necessary to look at the "totality of the facts", *Wallace vs. Wallace,* 352 So. 2d 1376. In looking at the totality of the facts it is not necessary there be *strong* evidence in support of recusal, but rather the test is whether the facts make it reasonable for members of the public, or for a party or counsel to *question* the impartiality of a judge, *Marr vs. Marr,* 383 So. 2d 194 and *Wallace, supra.* A Judge should disqualify himself if his impartiality might reasonably be questioned, Canon 3, Canon of Judicial Ethics. It was best said in *Offutt vs. United States,* 348 U.S. 11, 75 Sup. Ct. 11:

> "Justice must satisfy the appearance of justice."

Therefore, in order to look at the totality of the facts one must start at the beginning. On February 3, 1983, sometime directly before dark, something allegedly happened to Marirose Beaird

Gill. Before midnight of the same evening a warrant was signed by a Judge of the Fourteenth Judicial Circuit well after normal working hours. (R-209). The Complainant was accompanied to the Courthouse by her brother, a lawyer and friend of the trial judge *(R-11RH) and by her father, a retired Circuit Judge and friend of the trial judge. (R-10RH). The family of the alleged victim, therefore, immediately became involved in the court proceedings even to the point of receiving by mail, copies of court documents normally limited to the courts and attorneys of the parties. (R-624). The family members and their involvement continued to crop up even during the trial of the case. (R-16).

The Defendant was not afforded the usual preliminary hearing but was secretly indicted within *days* of the alleged offense. Then began a series of actions *affecting* the Defendant, but not *involving* the Defendant or his lawyer. The presiding Judge of the Circuit issued an Order apparently to the effect all Judges in the Circuit were recusing themselves (R-576); the Alabama Supreme Court appointed a Special Judge (R-579); Judge Wilson "unrecused" himself (R-610); and the Alabama Supreme Court "unappointed" the Special Judge (R-611). It appears during this period of time the trial Judge, Judge Wilson, *volunteered* to preside over this case after having one or more *ex parte* discussions with a member or members of the alleged victim's family, (R-14RH, R-15RH), Judge Wilson approached presiding Judge Nation and asked Judge Nation to let him try the case. (R-15RH). The discussion or discussions with the Beaird family (R-14RH) are highly questionable. Canon 3(4) of the Code of Judicial Conduct is clear that a Judge should neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. Larry Gill cannot say these *ex parte* meetings and discus-

---

*All references to Transcript page numbers including "RH" refer to the Transcript of the Recusal Hearing heard in Circuit Court on September 19, 1983 and on file with the Clerk of the Court of Criminal Appeals in the case of *ex parte* Larry Gill, Petition for Writ of Mandamus, and/or Petition for Writ of Prohibition, Appeals Court No. 6 Div.

sions had any effect on any decision of Judge Wilson's or the outcome on the case, but such ignorance on behalf of a party is exactly the reason for the rule. One Circuit Court Order and one Order of the Alabama Supreme Court was rescinded because of these *ex parte* meetings and discussions and the Defendant had absolutely no input.

Other facts raise whether members of the "public" would *question* the impartiality of the Judge trying the case. The Defendant subpoenaed as witnesses the alleged victim's father, Judge Beaird, and brother, Jim Beaird. Over objection by defense counsel the trial judge excused both these witnesses from the Rule and allowed them to stay in the courtroom during the proceedings. As early as September 19, 1983 the trial Judge was aware both individuals were subpoenaed as witnesses by the Defendant. (R-16RH) and excluded them from the Rule at trial without any inquiry of a proffer of their testimony or its importance. After considerable testimony was taken, the trial Judge did in fact change his mind and bring the brother, Jim Beaird, under the Rule, but refused to require the father, Judge Beaird, to leave the courtroom. (R-66). Did Judge Wilson demonstrate his bias and prejudice on behalf of his friends by excluding them from the Rule and did that decision possibly affect the outcome of the trial? The many reasons for the accepted rule for seqestering witnesses need not be gone into at this time. Suffice it to say that leaving a material witness in the courtroom to hear all the testimony would certainly affect the decision of a trial lawyer to place that witness on the witness stand.

As the facts disclose, the most important witness against the Defendant was Marirose Beaird Gill. Practically speaking, if her testimony were not believed the Defendant would be found not guilty. Before trial Judge Wilson made it clear he would not allow defense counsel to "try her" instead of the Defendant. (R-17RH) Because of his relationship did the trial court feel some duty to protect the witness? On one occasion during the trial the Court stopped the proceedings on its own volition in order to give relief to the witness. However, the witness her-

self indicated that she needed no relief and was perfectly alright. (R-157, 158). Later on the trial Judge admonished defense counsel not to "push" the witness (R-216). Is the trial court's attitude toward the witness the same as it would be with any other witness not known to him as he had earlier indicated it would be? (R-18RH). Again, the issue is whether or not members of the public, a party or counsel opposed would *question* the impartiality of the trial Judge. Obviously, if Defendant's counsel did in fact question the impartiality of the trial Judge and took his above quoted words as a warning, then his vigor at cross-examination and attempting to get to the truth of the matter would be thwarted.

The trial court had other information received in *ex parte* discussions with someone other than the Defendant or his attorney which might be further evidence. (R-534).

Even though the question of recusal has been called "personal" it is also a question of fact, *Wallace, supra.* A reading of the entire transcript of the recusal hearing (Crim. App. Ct. No. 6 Div 301) shows clearly the difficulty in obtaining and the obstacles preventing the gathering of these facts upon which the recusal issue could be decided. The trial Judge decided to personally try the recusal hearing (R-6RH) and then thwarted the gathering of the facts. (R-7RH), (R-24-25RH).

This Court does not take the subject of disqualification lightly. As it has said:

> "Every principle at law and canon of judicial conduct in our system of jurisprudence mandates the cold and stern neutrality of an impartial Judge. Anything less is a travesty." In re: *White*, 300 So. 2d 420.

Surely, if "justice must satisfy the appearance of justice" *Offutt, supra* the trial court should have recused itself as evidenced by the totality of the facts and the case is due to be reversed and remanded for trial by a wholly impartial judge.

IN THE SUPREME COURT OF ALABAMA

S.C. NO. 85-1402

EX PARTE: LARRY GILL,
VS.
IN RE: LARRY GILL, APPELLANT – PETITIONER
STATE OF ALABAMA, APPELLEE – RESPONDENT

AN APPEAL FROM THE CIRCUIT COURT OF
WALKER COUNTY, ALABAMA

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
(6th DIV. 530)

BRIEF AND ARGUMENT OF LARRY GILL

ARGUMENT II

WHETHER THE CIRCUIT JUDGE SHOULD HAVE RECUSED HIMSELF FROM PRESIDING OVER THE TRIAL.

The Attorney General's proposition that the simple theory of *res judicata* or collateral estoppel certainly does not hold water as per *Shell v. Shell*, 267 So.2d 461 and *Wallace v. Wallace*, 352 So.2d 1376 and others. The Defendant properly raised the issue by motion prior to trial and by a post trial Motion for New Trial. Good sense dictates that once raised it is a continuing viable issue which may be again raised on appeal. It is a question both "personal" to the Judge as well as factual. *Wallace, supra.* There may be a "personal" feeling of the trial judge prior to trial that he is not prejudiced, etc. and therefore should not recuse himself, and a Defendant may not be able to *prove* otherwise in order to convince a higher court of his position. However, sufficient *proof* can be demonstrated by the *facts* as they develop during the course of a trial and in fact show the trial court was in error in his original assessment. Certainly, once the issue is properly raised the Defendant at trial does not have to belabor the point and reassert the issue

after every fact of prejudice is demonstrated by the trial judge. Very simply, the issues of *res judicata* and collateral estoppel do not apply because the Alabama Court of Criminal Appeals and this Honorable Court were not aware of the *facts* at the time of the pretrial mandamus proceedings. The *facts* were only demonstrated during the course of the trial as pointed out in the writer's original brief on appeal. As stated in *Shell, supra,* "motion for disqualification may be made after issues joined if the grounds therefor were not known prior thereto". The "grounds" were not only the facts known prior to trial, but were the facts demonstrated during the course of the trial.

The Appellant preserved this argument for appeal purposes by properly filing a Motion for New Trial again raising the recusal issue. Therefore, a "Motion for Disqualification" was made after issue was joined and after grounds became known that were not known prior thereto, *DeMoville v. Merchants and Farmers Bank,* 237 Ala. 347, 186 So. 704 and *Shell, supra.*

C. ISSUES CONCERNING THE PROSECUTOR'S WITHHOLDING OF EXCULPATORY EVIDENCE AND IMPROPER REMARKS IN CLOSING

IN THE CIRCUIT COURT FOR WALKER COUNTY, ALABAMA

STATE OF ALABAMA,
Plaintiff,
VS. CASE NO. CC 83-33
LARRY GILL,
Defendant.

MOTION TO PRODUCE

Comes now the Defendant, Larry Gill, and moves this Honorable Court to require the State of Alabama to produce for his examination, copy and/or testing by experts the following:

1. Any and all statements alleged to have been made by the Defendant.

2. Any and all statements made by the alleged victim, Marirose Beaird Gill.

3. A list of any and all lawforcement officers, investigators, district attorneys, deputy district attorneys, or any investigator of any enforcement arm of the City, County or State of Alabama expected to be called by the State of Alabama at trial of this cause.

4. Any and all statements made by any law enforcement officer, investigator, district attorney, deputy district attorney or any investigator of any enforcement arm of the City, County or State of Alabama.

5. Any and all statements made by any witnesses to the alleged events.

6. A list of all witnesses expected to be called by the State of Alabama at the trial of this cause.

7. Any shot gun shell pellets alleged to have been collected by any investigator in relation to this alleged offense or offenses.

8. Any finger print evidence, including but not limited to "lifts", finger print cards and reports of experts concerning comparisons of finger print evidence.

9. Any hand written or tape recorded notes of any investigator, gathered during the investigation of the alleged offense (offenses).

10. Any evidence, be it physical or oral, tending to exculpate the Defendant.

11. Any evidence, be it physical or oral, tending to inculpate the Defendant.

IN THE CIRCUIT COURT FOR WALKER COUNTY, ALABAMA

STATE OF ALABAMA,
Plaintiff,
VS. CASE NO. CC 83-33
LARRY GILL,
Defendant.

MOTION TO PRODUCE

Comes now the Defendant, Larry Gill, and moves this Honorable Court to require the State of Alabama to produce for his examination, copy and/or testing by experts the following:

1. The automobile allegedly occupied by the alleged victim at the time of the incident, the basis of the charges herein.

2. The windshield of the automobile allegedly occupied by the alleged victim at the time of the incident, the basis of the charges herein.

3. Any and all physical evidence and any and all reports dealing with the physical evidence taken from the automobile allegedly occupied by the alleged victim at the time of the incident, the basis of the charges herein.

IN THE ALABAMA COURT OF CRIMINAL APPEALS

LARRY GILL, Appellant,
VS.
STATE OF ALABAMA, Appellee.

BRIEF AND ARGUMENT OF APPELLANT, LARRY GILL

ARGUMENT III

WHETHER THE DEFENDANT WAS DENIED DUE PROCESS BY THE FAILURE OF THE STATE TO PRODUCE FOR THE DEFENDANT THE RESULTS OF A TEST CONDUCTED BY AN EXPERT WITNESS.

The Defendant filed two Motions to Produce in this case.

(R-588, 594). In the first Motion to Produce the Defendant asked for any shotgun pellets alleged to have been collected by any investigator in relation to this alleged offense and any evidence tending to exculpate or inculpate the Defendant. The second Motion to Produce asked for any and all physical evidence and any and all reports *dealing with* physical evidence taken from the automobile occupied by the victim. On July 7, 1983 the trial court granted Defendant's Motion to Produce (R-613) as shown by the hand written notations by the trial Judge on the motion itself. (R-588). After the motion was granted and specifically on July 21, 1983, Mr. John Vaughn, the investigator for the Walker County District Attorney's Office conducted a test firing into a automobile similar to the victim's automobile. (R-475). He reduced his findings to writing and placed his report in the District Attorney's file. The report and results were not made known to the Defendant until Mr. Vaughn was *cross-examined* by defense counsel. (R-475). Not only were the test results not produced and hidden from the Defendant, the District Attorney attempted to keep the test results from the Defendant during the course of the trial. (R-475). The trial court overruled the attempt to keep the report from the Defendant and further examination of the results of the tests will show this tribunal why. Mr. Vaughn had removed from the alleged victim's automobile two shotgun pellets which according to Mr. Vaughn were number nine shot. The two pellets he recovered from the alleged victim's car were completely *round* and *not* scored in any manner. (R-473-474). However, the "test pellets" were oblong as if they had hit something. (R-476-477).

To make things worse it seems for some reason these "test pellets" which proved that the pellets removed from the alleged victim's car had not hit anything were in fact *destroyed* for some reason, after having been placed in the District Attorney's file.

Had the Defendant known of the tests run by the State, he very well would have conducted his own tests to corroborate the test of the State and therefore conclusively shown that the

pellets allegedly found in the victim's car were *not there* as a result of a firing at the windshield as the State theorized in this case. By having this information hidden from him he was precluded before trial from pursuing the issue.

It should be mentioned that in a very leading manner the prosecutor elicited from Mr. Vaughn that he had told defense lawyer about some "things" he did in firing into the car. There is no question Mr. Vaughn told defense counsel he had removed some pellets from the alleged victim's car, but that is the only information ever conveyed to defense counsel. (R-561).

The withholding of this exculpatory evidence from the Defendant is obviously a violation of the trial court's order and due process. *Brady vs. Maryland,* 373 U.S. 83, 83 Sup. Ct. 1194, 10 L.Ed. 2nd 215. *Robinson vs. State,* 405 So. 2d 1328; *Constitution of the United States,* Amendments V and XIV.

IN THE SUPREME COURT OF ALABAMA

S.C. NO. 85-1402

EX PARTE: LARRY GILL,
VS.
IN RE: LARRY GILL, APPELLANT – PETITIONER
STATE OF ALABAMA, APPELLEE – RESPONDENT

AN APPEAL FROM THE CIRCUIT COURT OF
WALKER COUNTY, ALABAMA

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
(6th DIV. 530)

BRIEF AND ARGUMENT OF LARRY GILL

ARGUMENT III

WHETHER THE DEFENDANT WAS DENIED DUE PROCESS BY THE FAILURE OF THE STATE TO PRO-

DUCE FOR THE DEFENDANT THE RESULTS OF A TEST CONDUCTED BY AN EXPERT WITNESS.

The Appellant adopts his argument and cases cited in his original brief.

* * *

MR. BAKER: I can't appeal to anybody. The defense can appeal to a higher Court. I can't appeal. This is it. I have one shot at it. It's like having one shot in your gun and you are out hunting with your dogs and he points at that last bird and you hadn't got one all day long, and you shoot and you miss it. Well, that's it. I've got one shot and that's this: If you were to return a verdict of 'not guilty', this case is ended for eternity. The defense can appeal this case.

MR. WAITES: Judge, I object to it.

COURT: Sustained.

MR. WAITES: As a matter of fact, I would like to make a motion out of the presence of the jury, please.

COURT: Ladies and gentlemen, you are not to consider the fact that the defense can appeal the case, and you are not to consider that in making up your verdict under any circumstances.

MR. WAITES: We ask for a mistrial, Judge. That's highly improper.

COURT: Overrule.

* * *

IN THE ALABAMA COURT OF CRIMINAL APPEALS

LARRY GILL, Appellant,
VS.
STATE OF ALABAMA, Appellee.

BRIEF AND ARGUMENT OF APPELLANT,
LARRY GILL

ARGUMENT I

WHETHER OR NOT THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR MISTRIAL AND DENYING A MOTION FOR A NEW TRIAL BASED SPECIFICALLY ON THE PROSECUTOR'S IMPROPER REMARKS TO THE JURY IN HIS CLOSING ARGUMENT.

The prosecutor, in his closing argument to the jury said, "I can't appeal to anybody. The defense can appeal to a higher court." (R-503). He followed with a further explanation and analogy and ended up by saying, "If you were to return a verdict of not guilty, this case is ended for eternity. The defense can appeal this case." (R-404-405). The defense objected, the court sustained and made a perfunctory admonition to the jury not to consider that the defense can appeal and not to consider that fact in making up the verdict. The admonition not being adequate, the defense asked for a mistrial which was overruled. (R-505).

The Defendant filed a Motion for New Trial and *specifically* raised this issue. (R-633). Said Motion for New Trial was denied. (R-640).

Such remarks by a prosecutor which touch on issues outside the perview of the jury and said solely to inflame and prejudice are *always* improper. The question is whether or not the court properly admonishes the jury and whether the jury was improperly influenced by the remarks. There is no question in the case at hand that the remarks by the prosecutor were very seriously improper, the court did not properly admonish the jury, and the jury was influenced.

The only effect of the prosecutor's argument would be to lead the jury into mistaken belief that their findings on the facts could be reviewed by a higher tribunal and therefore lessen the sense of responsibility resting on them. *Beard vs. State,* 95 So. 333. In the *Beard* case, *supra,* the prosecutor said:

> "If you convict him and make a mistake, the Court of Appeals or the Supreme Court will correct it, and if you acquit him, that is the end of it."

Except for a word or two here and there, the prosecutor in the instant case quoted the prosecutor in the *Beard* case, *supra.* This court reversed the *Beard* case based primarily on the failure of the trial court to grant a new trial upon motion and rightly so. Such language is an invitation to shift responsibility of the jury; a responsibility which is theirs alone.

Since the *Beard* case, *supra,* there are none touching on the use of exact words quoted. However, the law is clear as to how a trial judge should handle a situation where the prosecutor makes improper remarks to the jury. At a minimum, the trial judge should sustain the objection and should then promptly and *vigorously* give appropriate instructions to the jury. Such instructions should include that such remarks are improper, they should be disregarded, that statements of counsel are not evidence, and use every reasonable degree of effort to eradicate them from the minds of the jury. *Qualls vs. State,* 371 So. 2d 949; *Troup vs. State,* 26 So. 2d 611; *Mead vs. State,* 381 So. 2d 656; *Collins vs. State,* 385 So. 2d 993; *Coble vs. City of Birmingham,* 389 So. 2d 527; *Lamberth vs. State,* 307 So. 2d 43.

In considering whether the trial court handled this situation properly and did justice, it should be considered how "close", was this case. In looking at the case very broadly, there were two witnesses who said he did it and many who said he didn't do it. This was not a case where there was no doubt of the Defendant's guilt and thus such prejudicial remarks of the prosecutor would have had little or no effect. The court must look to the degree of guilt shown in determining whether such remarks might have swayed the jury in a prejudicial manner.

Jackson vs. State, 71 So. 2d 825; *Lamberth vs. State,* 307 So. 2d 43.

The Defendant did everything he could in Circuit Court to cure this error and get justice. He promptly objected to remarks and properly asked the trial court for a mistrial. (R-505). He filed a Motion for New Trial specifically raising this issue in writing, (R-633), and vigorously argued for a new trial (R-559-569).

The failure of the trial court to *vigorously* eradicate the prosecutor's comments from the minds of the jury as well as it's failure to grant a new trial are reversible error.

IN THE SUPREME COURT OF ALABAMA

S.C. NO. 85-1402

EX PARTE: LARRY GILL,
VS.
IN RE: LARRY GILL, APPELLANT – PETITIONER
STATE OF ALABAMA, APPELLEE – RESPONDENT

AN APPEAL FROM THE CIRCUIT COURT OF
WALKER COUNTY, ALABAMA

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
(6th DIV. 530)

BRIEF AND ARGUMENT OF LARRY GILL

ARGUMENT I

WHETHER OR NOT THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION FOR MISTRIAL AND DENYING A MOTION FOR A NEW TRIAL BASED SPECIFICALLY ON THE PROSECUTOR'S IMPROPER REMARKS TO THE JURY IN HIS CLOSING ARGUMENT.

In his brief, the Attorney General attempts to spell out the "rule" that should be applied to this issue:

> "That if the objection to the comment is overruled then reversible error occurs; if the objection is sustained, as in this case, and the jury instructed to disregard the remark, then the remark has been eradicated and no reversible error occurs".

His definition is incorrect.

First, there should be a determination of whether the comment of the prosecutor is improper. There is no question in the case at hand that the prosecutor's comment is improper. *Beard v. State,* 95 So. 333, *Pilley v. State,* 25 So.2d 57, *Oliver v. State,* 166 So. 615, *Plyler v. State,* 108 So. 83, *Peterson v. State,* 166 So. 20, as well as others. However, Appellee failed to point out that even though a Defendant at trial may get a favorable ruling on his objection to such remarks and an exclusion by the trial court, such comments must be (1) *vigorously* excluded from the minds of the jury and (2) each case must rest on its own facts and circumstances. *Oliver, supra,* can be discarded for not shedding much light. The reported opinion is devoid of facts and there is no recitation of the trial court's instruction to the jury to exclude. Based on other opinions it must be assumed the trial Court in *Oliver, supra,* in fact *vigorously* excluded the remarks and there were strong facts against the Defendant. The opinion in *Pilley* speaks to the points. There was no question Pilley killed the victim and the improper remarks of the prosecutor were in fact eradicated by the trial judge *"strongly"* instructing the jury that they should decide the case on the evidence presented to them, etc. Likewise, in *Peterson, supra,* the murder was "gruesome" and "the testimony considered in its most favorable aspect to the Defendant, makes a case of murder in the first degree". The trial court *"duly* instructed the jury to disregard the improper remarks of the prosecutor after having sustained the objection."

Among others, the writer has relied on *Beard, supra.* To further counter the Appellant's argument the Attorney General cites *Vice v. State,* 32 So.2d 107. However, and again, a careful reading of the case tells us that *Vice, supra,* did not change *Beard,* as is specifically mentioned in the opinion. In *Vice,*

supra, it was "undisputed that Appellant shot with a pistol – so that he died – one Travis T. Waits, on the front porch of the home". Obviously, the strong evidence against the Defendant in *Vice* had a bearing on the outcome and issues.

Without question, in the instant case, the remarks of the prosecutor were improper. Therefore, the question boils down to whether or not based on the facts of the case the Court's attempt to eradicate the remarks was sufficient. The facts against the Appellant were weak and the attempt to eradicate the improper remarks by the trial Court were also weak. Even after the trial Court sustained an objection to the comments it became his duty not only to sustain the motion or objection but also to exercise a reasonable degree of efforts to eradicate its effect on the minds of the jury. *Qualls v. State,* 371 So.2d 949, and others.

D. ISSUES CONCERNING THE WEIGHT OF THE EVIDENCE AND THE DENIAL OF PETITIONER'S MOTION FOR NEW TRIAL

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT
	)	
PLAINTIFF,	)	OF WALKER COUNTY,
	)	ALABAMA
VS.	)	
	)	CASE NO. CC83-33
LARRY GILL,	)	
	)	
DEFENDANT.	)	

MOTION FOR CONTINUANCE

Comes now the Defendant, Larry Gill, by and through his attorney of record and moves this Honorable Court to continue the probation hearing and the hearing on Defendant's Motion for New Trial currently set for Monday, April 16, 1984 at 1:30 P.M. and states grounds as follows:

1. The Defendant has submitted himself to a polygraph examination, the results of which affirmatively show that he is innocent of the charges for which he was convicted. A copy of the results of said polygraph test are attached hereto as Exhibit "A". Therefore, the testimony elicited at the trial in this cause, coupled with the results of the polygraph examination must lead to a substantial doubt the Defendant is guilty of the crime charged. The ends of justice would dictate that the State of Alabama re-open the investigation of this case with an open mind of the probable innocence of the Defendant, specifically, the State should agree to submit the Defendant to a second polygraph examination administered by a qualified examiner chosen by the State, but not employed by or connected with any investigative agency of Walker County.

2. The pre-sentence investigation previously submitted to the Court and expected to be used by this Court in determining whether or not Defendant should receive probation is fraught with rumors, innuendos and personal opinions that have no basis in fact and demonstrate bias and prejudice of the investigating officer. Said reports and its contents violate due process of law, the Constitution of the State of Alabama and the United States Constitution and specifically, but not limited to, Amendment Six of the United States Constituting concerning the right to be confronted with witnesses against him. The ends of justice would dictate that the pre-sentence investigation be conducted by an impartial and unbiased person, with the Defendant being apprised of and confronted by any adverse witness.

3. The Defendant is not guilty of the crime notwithstanding the jury verdict and the ends of justice would dictate that a investigation be conducted, at the direction of the Court, by some impartial and unbiased agency or investigative service.

EXHIBIT "A"

COMMERCIAL POLYGRAPH, INC.

DATE: 4/12/84
SUBJECT: LARRY JO GILL, JR.

CONFIDENTIAL:
Mr. Larry Waites
Attorney at Law

At your request LARRY JO GILL, JR. was given a polygraph examination to determine his truthfulness in a case of Assault. Standard polygraph procedure was exercised throughout the examination.

RESULTS:

During the pre-test interview LARRY JO GILL, JR. stated his address is Rt. 9, Box 185, Lot 12, Jasper, Ala., and that he was born 9/2/57 in Michigan. Subject said he has a high school education, has been married twice, is currently divorced with one dependent.

Subject said he was convicted in Feb. 1984 in Walker Co., Ala. of Assault and received a sentence of ten years in the penitentiary, which is being appealed.

Subject stated that he was employed at Mid West Pipe Coating Co. from 3/83 to 1/84, when he was laid off.

During the pre-test interview, the subject stated that he did not shoot at his former wife on Feb. 3, 1984 and he doesn't know who shot at her. The subject went on to say that he has no further information on the case.

The subject was then asked the following relevant questions:

TEST I

Q Do you plan to try to lie to any of these questions?
— no
Q Have you told me the whole truth about this matter?
— yes

Q Did you ever shoot at your wife's car?
— no
Q Did you ever shoot at your wife?
— no
Q Do you know who shot at your wife?
— no
Q Are you trying to withhold any information about this matter?
— no

TEST II

Q Did you know your wife was going to be shot at?
— no
Q Did you see your wife shot at?
— no
Q Were you present when your wife was shot at?
— no
Q Did you shoot at your wife?
— no
Q Have you told me the whole truth since we've been talking?
— yes
Q Did you purposely try to lie to any of these questions?
— no

CONCLUSION:

It is the opinion of this examiner that the subject told the truth during this polygraph examination.

Polygraph Examiner,

/s/ CLYDE A. WOLFE

Clyde A. Wolfe

IN THE CIRCUIT COURT OF WALKER COUNTY

STATE OF ALABAMA, Plaintiff

vs.

LARRY GILL, Defendant

CC-83-33

ORDER

This cause coming on to be heard and the defendant's attorney of record, Mr. Larry Waites, makes Motion for Continuance on the defendant's probation hearing and the defendant's Motion for New Trial, and after consideration of the same, the Court is of the opinion that the defendant's motions should be denied;

IT IS, THEREFORE, THE ORDER, JUDGMENT AND DECREE OF THIS COURT That the defendant's Motion for Continuance of the defendant's probation hearing and the defendant's Motion for New Trial be and the same is hereby denied.

DONE AND ORDERED, This the 16th day of April, 1984.

/s/ JAMES E. WILSON

Circuit Judge

IN THE ALABAMA COURT OF CRIMINAL APPEALS

LARRY GILL, Appellant,

VS.

STATE OF ALABAMA, Appellee.

BRIEF AND ARGUMENT OF APPELLANT, LARRY GILL

ARGUMENT VII

DEFENDANT WAS DENIED DUE PROCESS OF LAW BY THE DENIAL OF A MOTION FOR NEW TRIAL AFTER TRIAL COURT WAS AWARE OF NEW EVIDENCE IN

THE FORM OF A POLYGRAPH EXAMINATION SHOWING THE DEFENDANT'S INNOCENCE.

The Defendant filed a Motion for New Trial alleging evidence that was not known at the time of trial and that the judgment was against the great weight of the ecidence. There is a basic premise of law that a Defendant should not be denied "due process", *United States Constitution,* Amendments V and XIV; *Constitution of the State of Alabama,* Article 1, Section 6. The problem is one of defining due process. Due process is and should be an inherently flexible concept, not fixed in content, but varying from one situation to the next depending on the quest for the truth and justice.

In the case at hand the Defendant, after trial, passed a polygraph examination showing he was innocent of the charges. This fact was made known to the Court in support of a Motion to Continue the probation hearing and Motion for New Trial. The trial court denied the Motion for Continuance (R-555) and the Motion for New Trial (R-561).

IN THE SUPREME COURT OF ALABAMA

S.C. NO. 85-1402

EX PARTE: LARRY GILL,
VS.
IN RE: LARRY GILL, APPELLANT – PETITIONER
STATE OF ALABAMA, APPELLEE – RESPONDENT

AN APPEAL FROM THE CIRCUIT COURT OF WALKER COUNTY, ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(6th DIV. 530)

BRIEF AND ARGUMENT OF LARRY GILL

ARGUMENT VII

DEFENDANT WAS DENIED DUE PROCESS OF LAW BY

THE DENIAL OF A MOTION FOR NEW TRIAL AFTER TRIAL COURT WAS AWARE OF NEW EVIDENCE IN THE FORM OF A POLYGRAPH EXAMINATION SHOWING THE DEFENDANT'S INNOCENCE.

The Appellant adopts his argument and the cases cited in his original brief.

E. ISSUES CONCERNING PETITIONER'S SENTENCING UNDER *ALA. CODE* SECTION 13A-5-6 (1975).

IN THE ALABAMA COURT OF CRIMINAL APPEALS

LARRY GILL, Appellant,
VS.
STATE OF ALABAMA, Appellee.

BRIEF AND ARGUMENT OF APPELLANT, LARRY GILL

ARGUMENT IV

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT UNDER SECTION 13A-5-6(5) OF THE ALABAMA CODE TO A MANDATORY SENTENCE OF TEN YEARS.

The Defendant was indicted and tried on a charge of Attempt to Commit Murder and was found guilty of a lesser included offense of Assault in the Second Degree. (§13A-6-21 Alabama Code). (R-530). The trial Judge in charging the jury on this lesser included offense, (R-520), specifically referred to the elements included in §13A-6-21(2), Second Degree Assault; Physical injury by means of a deadly weapon or dangerous instrument. It was of this offense the Defendant was convicted: The offense of causing physical injury by means of a deadly weapon or dangerous instrument, a Class C Felony.

Code Section 13A-5-6(3) provides for imprisonment for Class C Felonies of not more than ten years nor less than one

year and one day. The trial Judge was of the opinion he had no choice in the matter of sentencing because of Code Section 13A-5-6(5), (R-535-537, 540), which provides for a mandatory sentence of not less than ten years for a Class C Felony in which a firearm or deadly weapon is used. Consideration of a sentence of less than ten years was not given because of this opinion.

Your Appellant contends that Code Section 13A-5-6(5) under which the Defendant was sentenced is not applicable to crimes in which a critical *element* of the crime itself consists of the use of a deadly weapon or dangerous instrument. This particular Code Section was intended to apply to those felonies, i.e. murder, manslaughter, criminal negligence, homicide, kipnapping, rape, sodomy, sexual abuse, etc., in which a critical element of the crime itself *does not* include the use of a deadly weapon or dangerous instrument. The legislature in enacting §13A-5-6(5), we contend, intended to provide for a mandatory minimum sentence of ten or twenty years for those convicted of the latter group of felonies in which a deadly weapon or dangerous instrument was used in the commission thereof and not to enhance the punishment for those crimes which already had as a *necessary element* for their commission the use of a deadly weapon or dangerous instrument.

The trial court in the instant case relied upon *Smith vs. State,* 447 So. 2d 1327 (Ala. Crim. App. 1983) affirmed 447 So. 2d 1334 (Ala. 1984) in support of its contention that the §13A-5-6(5) sentence of ten years was mandatory. The Defendant in the *Smith* case had been convicted of *Manslaughter,* a crime which by definition does not include the use of a deadly weapon or firearm.

The Alabama Court of Criminal Appeals in affirming the trial court (remanded for other reasons) cited, among other cases, *Scott vs. State,* 369 So. 2d 330 (Fla. 1979). In *Scott* the Defendant had been convicted of attempted murder, a crime which also by definition does not include as an element the use of a deadly weapon.

In neither the *Smith* nor the *Scott* case did the courts address

the issue here presented. The courts ruled only on the constitutionality of statutes. The courts there dealt only with the applicability of the enhancement statutes to crimes which by definition do not include the use of a deadly weapon.

In further support of your Appellant's contention that the enhancement statute was not intended to apply to those crimes which by definition do include the use of a deadly weapon is the fact that enhanced punishment has already been provided for them by statute. For example, if the Defendant in this case had intended and did cause injury to another but without the use of a deadly weapon he would have been guilty of assault in the third degree (§13A-6-22 (a) (1), a Class A misdemeanor. The penalty for such being less than one year in jail. But because he was convicted of intending and causing physical injury to another *using a deadly weapon* the crime by statute (§13A-6-21 (a) (2)) was Assault in the Second Degree, a Class C Felony, with an enhanced penalty already built in of from one to ten years. (§13A-5-6a (3)).

Certainly logic would tell you that the legislature intended and did add an *element,* "the use of a firearm or a deadly weapon", to those crimes which previously did not contain such an element. The legislature created a higher degree of crime based on the use of a weapon just as they had already done with the crime of assault by the adoption of the language in the 1975 Code.

It has always been the law that if two criminal statutes conflict, the one most favorable to the Defendant should prevail. Therefore your Appellant prays for a reversal for proper sentencing.

IN THE COURT OF CRIMINAL APPEALS

LARRY GILL, Appellant
VS.
STATE OF ALABAMA, Appellee

ON APPEAL FROM THE CIRCUIT COURT OF
WALKER COUNTY, ALABAMA

BRIEF AND ARGUMENT OF CHARLES A. GRADDICK,
ATTORNEY GENERAL, AND P. DAVID BJURBERG,
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR APPELLEE

There was no error in the manner of disclosing the test results.

IV.

THE DEFENDANT WAS PROPERLY SENTENCED UNDER §13A-5-6(5).

The Defendant argues that he was improperly sentenced to ten years under the provisions of §13A-5-6(5). The thrust of his argument is that the legislature did not intend for this statute to be applied to assault in the second degree as defined by §13A-6-21(2). The trial judge, relying on *Smith v. State*, 447 So.2d 1327 (Ala.Cr.App. 1983), was of the opinion that he had no discretion in sentencing the Defendant; accordingly he imposed a ten year sentence because a shotgun was used to commit the crime.

The case closest on point the undersigned has been able to find is *Norwood v. State*, 424 So.2d 1351 (Ala.Cr.App. 1982); *cert. denied*, 414 So.2d 1351 (Ala. 1983). Norwood had been found guilty of assault in the second and was sentenced in accordance with §13A-5-6(a)(5). This court found that Norwood had not been subjected to "double punishment" and affirmed his ten year sentence.

The attack in *Norwood*, supra was grounded on *Busic v. United States*, 446 U.S. 398, 500 S.Ct. 1747, 64 L.Ed.2d 381

(1981) and not on legislative intent. After discussing *Busic,* this court concluded that from the record before it, the court could not determine under which provisions of §13A-5-6 (a) had been applied and thus avoided the issue now before the court.

The case *sub judice* is distinguishable from *Busic,* supra because the statute involved in *Busic* contained its own enhancement provision when a firearm was involved. Obviously, this is not the situation in this case.

The State's contention is that the legislature intended to punish people who use firearms with harsher sentences. The assault statute had been law for four years when the enhancement statute, §13A-6-5 (a) (5) , was passed. Under general rules of statutory construction, the legislature was unaware of the assault statute when it approved the enhanced punishment for use of a firearm. The legislature intended this result due to the danger to the public by people who would use firearms to effectuate their crimes.

Although the use of a deadly weapon, in this case a shotgun, is an element of assault in the second degree, the Defendant is being punished, i.e., sentenced, only once.

V.

THE DEFENDANT WAIVED FORMAL ARRAIGNMENT.

The Defendant asserts that his due process rights were violated because he was not formally arraigned. Assuming that the facts are as alleged in his brief, he still is not entitled to relief according to *Marsden v. State,* ____ So.2d ____ (S.Ct. #83-292, Ms. released July 6, 1984) [1] and *Watts* (James Daniel) *v. State,* ____ So.2d ____ (S.Ct. #82-676, Ms. released December 9, 1983) . These cases stand for the proposition that once a defendant announces ready for trial, he was waived any

[1] *Marsden* cites *Watts v. State* as appearing at 435 So.2d 135 (Ala. 1983) ; this citation is *incorrect* and therefore the State has cited to the date the Watts opinion was released.

requirement for formal arraignment. This is precisely what occurred in the present case. The record is clear that the Defendant knew what the charges were. Thus, he had notice as required for due process. Furthermore, this issue was not raised for the first time on appeal. This is

IN THE SUPREME COURT OF ALABAMA

S.C. NO. 85-1402

EX PARTE: LARRY GILL,
VS.
IN RE: LARRY GILL, APPELLANT – PETITIONER
STATE OF ALABAMA, APPELLEE – RESPONDENT

AN APPEAL FROM THE CIRCUIT COURT OF
WALKER COUNTY, ALABAMA

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
(6th DIV. 530)

BRIEF AND ARGUMENT OF LARRY GILL

ARGUMENT IV

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT UNDER SECTION 13A-5-6(5) OF THE ALABAMA CODE TO A MANDATORY SENTENCE OF TEN YEARS.

The Appellant adopts his argument and cases cited in his original brief.

IN THE SUPREME COURT OF ALABAMA

S.C. NO. 85-1402

EX PARTE: LARRY GILL,
VS.
IN RE: LARRY GILL, APPELLANT – PETITIONER
STATE OF ALABAMA, APPELLEE – RESPONDENT

AN APPEAL FROM THE JUVENILE COURT OF
WALKER COUNTY, ALABAMA

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
(6th DIV. 530)

BRIEF AND ARGUMENT OF DON SIEGELMAN,
ATTORNEY GENERAL, AND P. DAVID BJURBERG,
ASSISTANT ATTORNEY GENERAL

There was no error committed by the prosecutor for not disclosing the test results.

IV.

THE DEFENDANT WAS PROPERLY SENTENCED UNDER § 13A-5-6(5).

The Defendant argues that he was improperly sentenced to ten years under the provisions of § 13A-5-6(5). The thrust of his argument is that the legislature did not intend for this statute to be applied to assault in the second degree as defined by § 13A-6-21(2). The trial judge, relying on *Smith v. State,* 447 So.2d 1237 (Ala. Cr. App. 1983) *aff'd,* 447 So.2d 1334 (Ala. 1984) (due process and equal protection grounds) was of the opinion that he had no discretion in sentencing the Defendant; accordingly he imposed a ten year sentence because a shotgun was used to commit the crime.

A case close on point is *Norwood v. State,* 424 So.2d 1351 (Ala. Cr. App. 1982); *cert. denied,* 414 So.2d 1351 (Ala. 1983).

Norwood had been found guilty of assault in the second and was sentenced in accordance with § 13A-5-69 (a) (5). The lower court found that Norwood had not been subjected to "double punishment" and affirmed his ten year sentence.

In *Bragg v. State,* 453 So.2d 756 (Ala. Cr. App. 1984), *cert. denied,* 453 So.2d 756 (Ala. 1984), the court held that subsection (a) (5) did not violate the double jeopardy clause (or the Eighth Amendment) citing *Smith,* supra. See also: *Holloway v. State,* 477 So.2d 457 (Ala. Cr. App. 1985), cert. denied, 477 So.2d 457 (Ala. Cr. App. 1985), cert. denied, 477 So.2d 487 (Ala. 1985).

In *McCullough v. State,* 451 So.2d 398, the Court of Criminal Appeals was faced with the task of construing § 13A-5-6 (a) (4) which requires a minimum sentence of 20 years for the use of a firearm or deadly weapon during the commission of a class A felony. McCullough was found guilty of *first degree robbery* by robbing the victim at gun point. The issue raised on appeal was whether the double jeopardy clause was violated. The court held that that provision of the constitution had not been violated because the legislature intended enhanced punishment for use of a firearm or deadly weapon.

This court denied certiorari on the authority of *Missouri v. Hunter,* 459 U.S. 359 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

In *Hunter* the United States Supreme Court held:

> Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger,* a court's task of statutory construction is at an end and the prosecutor may seek and the trial court may impose cumulative punishment under such statutes in a single trial."

Clearly, the rationals of *McCullough* and *Missouri v. Hunter,* apply with equal force to subsection (a) (5) and state would urge this court to so hold.

The State's contention is that the legislature intended to punish people who use firearms with harsher sentences. The assault statute had been law for four years when the enhance-

ment statute, § 13-A-6-5 (a) (5), was passed. Under general rules of statutory construction, the legislature was aware of the assault statute when it approved the enhanced punishment for use of a firearm. The legislature intended this result due to the danger to the public by people who would use firearms to effectuate their crimes.

Although the use of deadly weapon, in this case a shotgun, is an element of assault in the second degree, the Defendant is not subjected to double jeopardy because he is not being subjected to multiple punishments.